77-1686

In the Supreme Court of the United States

October Term, 1977

LEO SHEEP COMPANY
and PALM LIVESTOCK COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, and
DIRECTOR, BUREAU OF LAND MANAGEMENT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in *Leo Sheep Company v. United States of America*, No. 76-1138.

OPINIONS BELOW

The opinion of the United States District Court for the District of Wyoming has not been officially reported and is appended hereto as Appendix A. The opinions of the United States Court of Appeals for the Tenth Circuit have been reported at 570 F.2d 881, 890, and are appended hereto as Appendix B.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered on May 17, 1977, and the order and supplemental opinion of that court denying rehearing were entered on February 28, 1978. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether lands granted by the United States in 1862 under the Union Pacific Railroad Act are subject to an implied reservation of easements that is inconsistent with express language of grant contained in the Act and in the patents issued pursuant thereto.

2. Whether the implication of reserved rights-of-way over lands granted by the United States in 1862 can be premised on the enactment in 1885 of the Unlawful Inclosures of Public Lands Act or the decision of this Court in *Camfield v. United States* construing the Act.

3. Whether an appellate court can as a matter of law infer Congressional intent contrary to express and unambiguous language of a Congressional act, with respect to an issue excluded from consideration by the trial court by stipulation of the parties, and in so doing preclude examination of legislative history and longstanding administrative interpretation of the act.

STATUTES INVOLVED

The statutes involved are the Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492, *as amended*, Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358, and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66, which are reproduced in Appendix C.

STATEMENT OF THE CASE

Petitioners Leo Sheep Company and Palm Livestock Company conduct ranching operations on substantial acreages of fee and public lands in Carbon County, Wyoming, situated to the east and south of the Seminoe Reservoir. The fee lands of petitioners constitute for the most part odd-numbered sections patented to the Union Pacific Railroad Company or its assigns under authority of the Act of July 1, 1862, §§ 3, 4, ch. 120, 12 Stat. 489, 492, *as amended*, Act of July 2, 1864, § 4, ch. 216, 13 Stat. 356, 358 (hereinafter referred to as the "Union Pacific Act"). (Appendix C at xxviii-xxx.) The public lands consist of even-numbered sections, alternating between the patented lands of petitioners in a "checkerboard" fashion, utilized by petitioners under grazing licenses issued by the United States pursuant to Section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b.

On December 20, 1973, respondent United States commenced constructing a road across the fee lands of petitioner Leo Sheep Company from a county road on the east to the Seminoe Reservoir and its environs on the west and thereafter erected signs along this road inviting the public to use it for access to the Reservoir.

Petitioner Leo Sheep Company did not consent to the construction of this road, and respondent United States instituted no condemnation proceedings and offered no compensation to petitioner with respect thereto. Instead, respondent asserted the right to construct that road and other roads on the lands of petitioners without payment of compensation by reason of (i) common law easements of necessity said to burden petitioners' fee lands for benefit of the alternating lands of the United States and (ii) easements over petitioners' fee lands granted to the United States pursuant to the Unlawful Inclosures of Public Lands Act of 1885, 43 U.S.C. §§ 1061-66, which prohibits unlawful obstruction of the public domain. (See Appendix C at xxx-xxxii.)

Petitioners thereafter initiated this action to quiet their respective titles to the fee lands against the United States, pursuant to 28 U.S.C. § 2409a.[1] At a pretrial conference, the parties stipulated to the facts concerning petitioners' ownership of the fee lands, the construction of the road across the lands of petitioner Leo Sheep Company without permission or compensation, and the absence of any express reservation by the United States of a right-of-way in the patents to petitioners' lands. Both sides then moved for summary judgment, on the issues of the existence of common law ways of necessity and the effect of the Unlawful Inclosures of Public Lands Act.

[1]Petitioners' Complaint also sought to require the Secretary of the Interior and the Director of the Bureau of Land Management of the Department of the Interior to prepare and circulate an environmental impact statement prior to construction of roads across the railroad grant lands and prior to permitting substantial increase in public use of the Seminoe Reservoir, pursuant to Section 102(c) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(c).

On November 13, 1975, the District Court granted petitioners' motion for summary judgment and quieted their respective titles to the fee lands against respondent United States. The court held that (i) no act or patent of the United States granted access easements across the fee lands of petitioners for the benefit of public domain lands and (ii) reservations of easements of necessity burdening the fee lands of petitioners could not be implied in the patents to petitioners' predecessors in title because the sovereign power of eminent domain permitted the United States to condemn such rights-of-way as it might require for access to public lands. (Conclusions of Law Nos. 3, 4, 6, Appendix A at iv, v.) The court noted that for 110 years after the grant of the fee lands to the Union Pacific Railroad Company in 1862, no officer or agent of the United States had construed the grant or the patents issued pursuant thereto as conferring any right in the United States, its agents or the public to traverse the lands granted to the railroad, and it held that condemnation was the only permissible means by which the United States could acquire an interest in petitioners' lands. (Conclusions of Law Nos. 5, 6, Appendix A at v.)[2]

On appeal of respondents, the Court of Appeals for the Tenth Circuit, in a 2-1 decision, reversed the judgment

[2]In light of its decision that the United States had no authority to construct the roads at issue, the District Court declined to determine whether respondents were required to prepare an environmental impact statement. (Conclusion of Law No. 7, Appendix A at v.)

of the District Court on an issue not presented to or decided by that court, *i.e.*, whether as a matter of law Congress had *intended* that the United States reserve an implied right-of-way over the lands granted pursuant to the Union Pacific Act. The Court of Appeals held that the trial court had erred in "holding" that there was no such implied reservation (although the trial court had not in fact addressed this issue), for the stated reason that "[t]o hold to the contrary would be to ascribe to Congress a degree of carelessness or lack of foresight which in [the court's] view would be unwarranted." (Appendix B at xi.)

The Court of Appeals did not conclude that the United States was entitled to a common law way of necessity across petitioners' fee lands; it did not challenge — or even mention — the conclusion of the District Court that the sovereign power of eminent domain possessed by the United States removed any necessity for the implication of ways across petitioners' lands. The court also did not base its determination on legislative history, administrative construction or other evidence of Congressional intention. Rather, the court found itself "unable to conclude" that Congress had intended to grant lands to the railroad without reserving a right of access to lands retained by the United States. (Appendix B at xi.) Thus the court added a reservation in the Union Pacific Act that the Congress had neglected to make, and created rights in the United States by judicial act that had not been claimed by the United States for 110 years and were not discoverable by grantees of the United States or their successors from the language of any statute or from any public land record.

Petitioners thereafter filed a petition for rehearing with a suggestion for *in banc* consideration. Nine months later, on February 28, 1978, the Tenth Circuit denied *in banc*

consideration by a 4-3 vote and issued a supplemental opinion denying rehearing. In response to petitioners' request for a remand to the District Court so that petitioners would have the opportunity to address the issue on which the case had been decided by the Court of Appeals and to present legislative history, expert testimony and other evidence bearing on the supposed Congressional intention identified by the court, the court held that the "issue of implied reservation posed an issue of law" and that petitioners were not entitled to make a showing on the matter. (Appendix B at xxvii .)

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit creates implied easements, not known at common law and never before recognized by any court, across a minimum of 150,000,000 acres of land throughout the United States. The decision raises important, unprecedented issues of federal law and contravenes consistent decisions of this Court concerning public grants and security of patent titles; it legislates reservations in a Congressional grant act, inconsistent with the express language of the act, for the express purpose of negating "carelessness" or "lack of foresight" on the part of Congress.

We respectfully submit that the case merits review by this Court for the following reasons:

A. *The case presents a federal question of far-reaching impact on land titles.*

The decision of the Tenth Circuit impresses rights-of-way of undefined scope (i) across all lands patented pursuant to the Union Pacific Act and other railroad grant

acts with aggregate acreage throughout the United States in excess of 131,000,000 and (ii) upon some 17,000,000 acres of checkerboard lands granted to the states for roads, canals and other improvements as early as 1827.[3] In each of these land grant acts, Congress purported to make an absolute grant, patents were issued without reserved easements, and no implied easement inconsistent with the grant has ever been asserted by the United States. The decision below, if allowed to stand, will provide a basis for inferring nineteenth century Congressional intention to reserve twentieth century ways for public crossings under all Congressional land grant legislation without use of condemnation procedures and payment of just compensation. The precedent of the decision, moreover, as a license for judicial legislation, extends beyond the railroad and public improvement grant legislation; it would cloud titles under any public land act or any public grant that is measured, by hindsight, as inopportune or lacking in foresight.

If the decision stands, persons in untold numbers who have conveyed public grant lands without actual or constructive notice of limitations on their titles will be potentially liable for breach of warranty. Persons who have acquired and improved lands on the basis of clear title opinions or title insurance policies are now exposed to noncompensable losses by the opening of public ways through their lands. Persons who issued such opinions or insurance policies are now potentially liable for the value of the property lost. The lands potentially affected may have been subdivided or otherwise intensively developed; the reserved rights burdening such lands may be claimed by the United States — or its successors — on behalf of

[3]See P. Gates, *History of Public Land Law Development* 345-46, 356-79, 384-85 (1968).

lands no longer in public ownership and for benefit of any conceivable activity no matter how remote from uses contemplated in the 1800's.

Although the foregoing description of the impact of the decision may, at first blush, be viewed as an argumentative parade of horrors, we respectfully submit that each of these consequences is reasonably foreseeable from the language and rationale of the Court of Appeals.

B. *The questions presented involve important matters of federal law not heretofore resolved by this or any court.*

The Court of Appeals held, as a matter of federal law, that reservations can be implied in public land grants incompatible with unqualified language of grant in the authorizing act and implementing patent. The propriety of such a holding is a matter of significant federal law, a matter of first impression, that has (i) not heretofore been resolved by this or any other court and (ii) digresses completely from positive pronouncements of this Court in related areas, in that:

1. No case was cited by the Court of Appeals or counsel for the Government that reached this result.

2. Decisions of this Court and other courts that have recognized rights in the United States by reservation have never imputed a right on behalf of the Government that is inconsistent with unequivocal language of Congressional grant or reservation. Congress has often expressly required reservations in grants of public lands (*e.g.*, 43 U.S.C. §§ 146, 299, 359, 375d, 542, 682b, 945, 965d, 1068, 1424), and in such cases it is settled that, as a matter of federal law, an

unrestricted patent of such lands will not convey what the law has reserved. *Swendig v. Washington Water Power Company*, 265 U.S. 322, 332 (1924); *United States v. State of Washington*, 233 F.2d 811, 817 (9th Cir. 1956). And where express reservations of federal lands are authorized and made, reservations ancillary thereto have been implied, again as a matter of federal law, where consistent with and necessarily incident to the enjoyment of the rights explicitly reserved. *Winters v. United States*, 207 U.S. 564 (1907); *Arizona v. California*, 373 U.S. 546, 595-601 (1963).

However, where Congress has directed that lands be patented *without* restriction or limitation, patent reservations have been held inoperative as a matter of federal law. *Shaw v. Kellogg*, 170 U.S. 312, 337-38 (1898); *Deffeback v. Hawke*, 115 U.S. 392, 406 (1885).

If rights cannot be *expressly* reserved from a grant by the United States when such reservation is inconsistent with Congressional command, it would follow that such rights may not be *impliedly* reserved. No decision has been found that holds to the contrary.

3. The District Court held that the United States was not entitled to claim the benefit of an easement implied by necessity because the sovereign power of eminent domain permitted it to take what ways it needed. (Appendix A at v.) In so holding, the District Court applied a settled common law conveyancing rule to the United States.[4]

[4]See *State v. Black Brothers*, 116 Tex. 615, 297 S.W. 213, 218-19 (1927); *Pearne v. Coal Creek Mining and Manufacturing Company*, 90 Tenn. 669, 18 S.W. 402, 404 (1891); see also *United States v. Rindge*, 208 F. 611, 619 (S.D. Calif. 1913); *Bully Hill Copper Mining and Smelting Company v. Bruson*, 4 Cal. App. 180, 87 P. 237, 238 (1906); *Simonson v. McDonald*, 131 Mont. 494, 311 P.2d 982 (1957); *Guess v. Azar*, 57 So. 2d 443, 444-45 (Fla. 1952).

The Court of Appeals did not discuss this conclusion of the District Court or the authorities supporting the common law rule, yet it created as a matter of federal law an interest in the United States that is in all material respects identical to an easement by necessity, without the requirement of necessity. No authority supports the implication of such an interest, either at common law or under any federal legislation, either on behalf of a sovereign or an individual grantor.

C. *The decision below contravenes and fundamentally misconstrues decisions of this Court.*

1. *The Unlawful Inclosures Act and other "fence" cases.* The Court of Appeals relied on *Camfield v. United States*, 167 U.S. 518 (1897), and *Buford v. Houtz*, 133 U.S. 320 (1890), as "judicial recognition that Congress, by its 1862 grant to the railroad of the odd-numbered sections, did by implication intend to reserve a right of access to the interlocking even-numbered sections *not* conveyed to the railroad." (Appendix B at xvi.)

In *Camfield*, the Court construed the Unlawful Inclosures Act to authorize Government attorneys to abate as nuisances fences on private checkerboard lands surrounding and thereby appropriating vast areas of public land; it holds only that the "Property Clause [U.S. Const., Art. IV, § 3, cl. 2] is broad enough to permit federal regulation of fences built on private land adjoining public land when the regulation is for the protection of the federal property." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

Similarly, in *Buford* the Court affirmed the denial of injunctive relief sought by owners of checkerboard land against sheepherders who made no effort to keep their

flocks from grazing on plaintiffs' lands in conjunction with the interspersed public lands. The decision, as in *Camfield*, was explicitly premised upon a reluctance to lend judicial authority to the attempted monopolization of public lands.

Neither of these decisions was premised upon the existence of an easement in the United States across private lands for the benefit of public lands; neither authorized construction of roads across private land for public purposes; neither construed the Union Pacific Act or any other Congressional land grant. Both were confined to the interpretation of rights in *public* lands of persons attempting to monopolize such lands by fencing or other means. If the construction of the Unlawful Inclosures Act adopted by the Court of Appeals ostensibly on the basis of *Camfield* is allowed to stand, it will amount to judicial sanction of the later imposition of servitudes by Congress on lands previously granted by it, in violation of principles long since settled by this Court. See *Union Pacific Railroad Company v. United States*, 99 U.S. 700, 718-19; (1879); *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *United States v. Causby*, 328 U.S. 256, 261-62 (1946).

2. *The "act and conveyance" cases.* The Court of Appeals cited *Missouri, Kansas and Texas Railway Company v. Kansas Pacific Railway Company*, 97 U.S. 491 (1878), and *Schulenberg v. Harriman*, 88 U.S. 44 (1875), for the proposition that a legislative land grant, being both a conveyance and an act, may be interpreted retrospectively on the basis of assumed congressional intent without regard for principles of conveyancing and title security recognized by this Court. (Appendix B at x.) Both decisions, however, merely stated hornbook principles that a

Congressional land grant is both a conveyance and an act and that, therefore, the grant when finally located can be effective from the date of the act rather than the date of the location or patent; neither purported in any way to authorize an inference of Congressional intent that is *inconsistent* with the express and unqualified language of grant in the same Congressional act. In its misplaced reliance on these decisions, the Court of Appeals contravened the fundamental rule that public grants "are not to be so construed as to . . . withhold what is given either expressly or by necessary or fair implication." *United States v. Denver and Rio Grande Railway Company*, 150 U.S. 1, 14 (1893); see *Russell v. Sebastian*, 233 U.S. 195, 205 (1914).

3. *The "title security" cases.* The decision of the Court of Appeals is incompatible with decisions of this Court protecting title security and patent defensibility. This Court has held that it is through the recognition of a patent "as a record of the government that its security and protection chiefly lie." *Beard v. Federy*, 70 U.S. 478, 492 (1866). It is the "unassailable character" of a patent which "gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces." *St. Louis Smelting and Refining Company v. Kemp*, 104 U.S. 636, 641 (1882). The conclusiveness of patents and the right of a patentee and his successors to rely upon the title record has been affirmed by this Court in refusing to permit collateral challenge to determinations of fact supporting patent issuance, *St. Louis Smelting and Refining Company v. Kemp, supra*, and in refusing to countenance the uncertainty that would be created by purporting to reserve from a patent "mineral lands" identified as such after patent. *Burke v. Southern Pacific Railroad Company*, 234 U.S. 669 (1914). The decision below cannot stand without severely undermining the title security recognized by these decisions.

4. *The "judicial legislation" cases.* The Court of Appeals held that the question of Congressional intent in enacting the Union Pacific Act "posed an issue of law" and refused petitioners' request for a remand for the taking of evidence in the trial court on the question. (Appendix B at xxvii.) The court did not have before it evidentiary matter pertaining to Congressional intent in connection with enactment of the Act; it held that Congress *must* have intended to reserve an easement simply because as a matter of law the Court was "unable to conclude" that Congress could have meant otherwise. (Appendix B at xi.)

The authority of a court to infer Congressional purpose is limited to situations where it first finds an ambiguity in the legislative pronouncement; where, as here, the language of a statute is not found to be ambiguous or in any way unclear, a court cannot divine some unexpressed Congressional purpose contrary to the language employed. *Bate Refrigerating Company v. Sulzberger,* 157 U.S. 1, 36-37 (1895); *United States v. Missouri Pacific Railroad Company,* 278 U.S. 269, 277-78 (1929). If the decision below were justified as judicial construction of an ambiguous act (a justification not even claimed by the Court of Appeals), it would have been incumbent upon the court under decisions of this Court to have identified the ambiguity in the language employed and thereupon to have engaged in a "considered weighing of every relevant aid to construction." *United States v. Dickerson,* 310 U.S. 554, 562 (1940). Such consideration requires examination of a statute's "administrative and legislative history." *McCaughn v. Hershey Chocolate Co.,* 283 U.S. 488, 492 (1931); see, *e.g., Great Northern Railway Company v. United States,* 315 U.S. 262 (1942).

The Court of Appeals did not identify any statutory ambiguity in the Union Pacific Act; it did not purport to weigh "every relevant aid to construction"; it disallowed consideration of legislative and administrative history. It did not engage in permissible statutory construction; it engaged in impermissible judicial legislation.

D. *The Court of Appeals evidenced uncertainty in its decision and recognized the significance of the issues raised.*

An initial 2-1 decision of the Court of Appeals in this case was rendered on May 17, 1977. Petitioners thereafter filed a petition for rehearing with a suggestion of *in banc* consideration. The Court of Appeals then requested the United States to file a response to the rehearing request, which the Government did on June 16, 1977.

Nearly nine months later, the Court of Appeals issued its opinion denying rehearing, by another 2-1 decision, along with an order noting that the court had voted 4 to 3 to deny *in banc* consideration. (Appendix B at xxi-xxii.) In its supplementary opinion, the court agreed that the issue of Congressional intent in the Union Pacific Act "is a difficult problem and not one which is free from all doubt." (Appendix B at xxvii.)

The Tenth Circuit was clearly troubled by the question it had determined and was split on its proper resolution. In view of its far-reaching impact, the question should be reviewed by this Court.

CONCLUSION

For the reasons stated herein, petitioners respectfully pray that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

LEO SHEEP COMPANY and PALM LIVESTOCK COMPANY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR and CURT BERKLUND, Director, Bureau of Land Management,

Defendants.

No. C74-127

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The above-entitled matter coming on regularly for hearing before the Court, plaintiffs appearing by and through their attorneys, John A. MacPherson of MacPherson & Golden, Rawlins, Wyoming, and Clyde O. Martz and Howard L. Boigon of Davis, Graham & Stubbs, Denver, Colorado, and the defendants appearing by and through their attorney, Tosh Suyematsu, Assistant United States Attorney, and it having been stipulated and agreed that the matter would be submitted to the Court for decision upon a stipulation of facts, motion for summary judgment and cross-motion for summary judgment, and the parties having further agreed that there are no genuine issues of material fact with respect to the subject matter and that the matter can be decided upon the motions for summary judgment filed herein, and the Court having reviewed the pleadings, interrogatories, answers thereto, and memorandum briefs, together with all other materials on file herein, and being fully advised in the premises, DOTH FIND:

FINDINGS OF FACT

1. That this is an action to quiet title against the United States pursuant to 28 U.S.C. § 2409a and to require the Secretary of the Interior and the Director of the Bureau of Land Management to file an environmental impact statement pursuant to § 102(c) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(c).

2. That plaintiffs Leo Sheep Company and Palm Livestock Company are the owners in fee simple, subject to mineral reservations, easements and encumbrances of record, of certain patented lands in Townships 22-25 North, Ranges 82-84 West, 6th P.M., in Carbon County, Wyoming, consisting, with a few exceptions not herein relevant, of the odd-numbered sections in said townships and ranges (fee lands). Said fee lands alternate in a "checkerboard" fashion with public domain lands on which plaintiffs conduct livestock operations conjunctively with the fee lands, under licenses issued by the defendant United States of America pursuant to Section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b, and the regulations promulgated thereunder, 43 C.F.R. § 4115.2-1 (1974). No fences separate the fee lands from the public domain lands.

3. That said fee lands were granted to the Union Pacific Railroad Company by the Act of July 1, 1862, ch. 120, 12 Stats. 489, as amended, Act of July 2, 1864, ch. 216, 13 Stats. 356, and were patented to successors of said railroad company in the years 1900-03. None of the patents contains an express reservation of a right of way on behalf of the United States over the lands granted for access to the lands retained by the United States. No language in the railroad land grants acts reserves or in any way refers to any such right of way on behalf of the United States.

4. That the fee lands are situated to the east and south of the Seminoe Reservoir. During the year 1973, defendant United States of America, through its officers and agents, asserted that it had the right to construct, without compensation to plaintiffs, a road across the fee lands for use by members of the public in obtaining access

to the east side of the Seminoe Reservoir. The basis of the assertion was stated to be either an easement for access impliedly reserved on behalf of the United States in the patents to the fee lands or an easement of necessity granted to the United States pursuant to common law. Defendant asserted an easement in plaintiffs' lands on no other basis.

Following the refusal of plaintiffs to acknowledge the existence of such right, the United States of America, acting by and through officers and employees of the Bureau of Land Management of the Department of the Interior, on December 20, 1973, commenced constructing a road extending from an existing road in Section 14, Township 24 North, Range 83 West, 6th P.M., westerly across both public domain lands (Sections 14, 16 and 22 of said Township and Range) and fee lands of plaintiff Leo Sheep Company (Section 15 of said Township and Range). Subsequently, defendants erected signs along said road inviting the public to enter thereon for access to the Seminoe Reservoir. Plaintiff Leo Sheep Company did not consent to the construction and defendant United States has neither offered nor paid any compensation to plaintiff for those portions of the fee lands traversed by the road.

5. That prior to construction of the above road, agents of the Bureau of Land Management of the Department of Interior prepared an "Environmental Analysis Record" to determine whether the proposed action by the United States should be preceded by the filing of an environmental impact statement pursuant to Section 102(c) of NEPA. The environmental analysis report considered only the question whether construction of the road constituted a major federal action significantly affecting the quality of the human environment within the meaning of NEPA and concluded that it did not.

6. That no environmental impact statement was prepared by agents of the United States prior or subsequent to construction of the road across the fee lands of plaintiff Leo Sheep Company. The United States has acknowledged that the road will presumably cause an increase in the number of users of the Seminoe Reservoir; it does not

intend to erect fences along the road to keep the public from trespassing on the fee lands and has limited its efforts to prevent such trespassing to the erection of signs along the road advising the public to remain thereon.

7. That Rule 71A, Federal Rules of Civil Procedure, provides a plain, adequate and speedy remedy whereby defendants may acquire right of way for road purposes leading to the east side of Seminoe Reservoir.

8. That following construction of the road and erection of the signs, plaintiffs initiated this action to quiet their title against the United States, pursuant to 28 U.S.C. § 2409a, and to require the Secretary of the Interior and the Director of the Bureau of Land Management of the Department of the Interior to prepare and circulate an environmental impact statement pursuant to § 102(c) of NEPA.

CONCLUSIONS OF LAW

1. The property of the United States can be conveyed, and interests therein reserved, only if Congress makes provision therefor; and only Congress may prescribe conditions and limitations upon the title conveyed by patent. In supervising the issuance of patents by which the Government passes title to portions of the public domain, the Secretary of the Interior has only such authority as Congress has granted him.

2. To the extent that the Secretary of the Interior has authority to determine the scope of the grant effected by a patent, the failure of the Secretary to include an express reservation in the patent precludes the Government from subsequently asserting the existence of such limitation. The issuance of the patents to the fee lands without express reservation of access easements on behalf of the public bars the Government from asserting the existence of such easements subsequent thereto.

3. Implied reservations as against express covenants are not favored and are limited to ways of strict necessity, requiring clear and convincing evidence of need and resolving all doubts against the grantor.

4. Easements may not be implied in patents in favor of the United States because the sovereign power of eminent domain permits the United States to condemn such rights of way as may be reasonably required for access to any public lands under Rule 71A, Federal Rules of Civil Procedure.

5. For 110 years after the grant of the fee lands to the Union Pacific Railroad Company, neither the Department of the Interior nor any other agency or agent of the United States construed the grant or the patents issued pursuant thereto as conferring any right upon the United States, its agents or the public to traverse the lands granted to the railroad, and such administrative construction should be given great weight in the event of doubt concerning the scope of the grant.

6. Accordingly, this Court concludes that the United States has not reserved or received by grant, expressly or by implication, and does not now have, any right, by easement or otherwise, in the lands of plaintiffs for access to the east bank of Seminoe Reservoir, or for construction of public roads across the lands of plaintiffs for access to said reservoir and lands, and absent condemnation proceedings and payment of just compensation is without authority to construct such road.

7. In light of the foregoing, it is unnecessary for the Court to rule at this time upon the necessity of preparation of an Environmental Impact Statement as required by § 102(c) of NEPA.

8. An order will be entered sustaining plaintiffs' motion for summary judgment and quieting title to plaintiffs' fee lands against the defendants.

Dated this 13th day of November, 1975.

s/EWING T. KERR

Judge

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1138

LEO SHEEP COMPANY, et al., Plaintiffs-Appellees, v. UNITED STATES OF AMERICA, et al., Defendants-Appellants.	Appeal from the United States District Court for the District of Wyoming. (D. C. No. C 74-127)

Filed May 17, 1977

Before McWILLIAMS, BARRETT, and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

Leo Sheep Company and Palm Livestock Company, both Wyoming corporations, brought suit against the United States of America, the Secretary of the Interior, and the Director of the Bureau of Land Management for declaratory and injunctive relief under the Quiet Title Act, 28 U.S.C. § 2409a. The plaintiffs, as owners of certain odd-numbered sections of land in Carbon County, Wyoming, claimed that the United States had unlawfully entered their property by *clearing a pathway* across certain of their section corners, which interlocked with the even-numbered sections of the public domain. By answer the United States acknowledged clearing this path, and claimed it had the legal right to do so. After stipulating to

the facts, both sides moved for summary judgment. The district court ruled in favor of the plaintiffs, and the United States now appeals.

The odd-numbered sections of land here involved were granted by Congress in 1862 to the Union Pacific Railroad. Act of July 1, 1862, ch. 120, 12 Stat. 489, 492(3) and (4), *as amended,* Act of July 2, 1864, ch. 216, 13 Stat. 356, 358(4). Leo Sheep, hereinafter referred to as the plaintiff, now owns the odd-numbered sections as successor-in-title to the railroad. By virtue of leases issued under section 3 of the Taylor Grazing Act, 43 U.S.C. § 315(b), plaintiff also uses the interlocking even-numbered sections of the public domain for general grazing and pasturage, and thereby has integrated its operations into an undivided unit. However, the fact that plaintiff has grazing rights in the even-numbered sections is not urged by either party as being of any particular significance, and hence for the purposes of this case, at least, the even-numbered sections may be treated as simply being part of the public domain, which indeed they are.

Under the stipulation, we are here concerned with Section 15, Township 24 North, Range 83 West, 6th P.M., which is owned by the plaintiff as successor-in-interest to the railroad. The grant by Congress to the railroad in 1862 was of the odd-numbered sections, which made for a checkerboard effect. The aforesaid Section 15 is hence surrounded on all four sides by sections of the public domain. In 1938 the Bureau of Reclamation built the Seminoe Reservoir to the west and south of Section 15. Down through the years the reservoir and adjacent area have been used for fishing and hunting. Problems have arisen concerning the ability of the public to gain access to the area. In 1965 several livestock operators established Elk Mountain Safari, Inc.,[1] which proceeded to institute a system of "access fees" which the public had to pay before they could get into the area. The Government received complaints about this practice, and attempted to

[1]Elk Mountain Safari, Inc. was a plaintiff in the present proceeding, but was later withdrawn from the case.

negotiate with the livestock owners to secure public access to the Seminoe Reservoir area. When these negotiations failed, the Government decided to relocate and improve an existing dirt road in that area in order to provide the public access to the reservoir area from a nearby public highway. The Government's effort to establish such a road is what generated the present dispute.

Reference is now made to the appendix which is a sketch of the area in question. Section 15, as well as other odd-numbered sections, which on the sketch are shaded, are owned by the plaintiff as the successor-in-title to the railroad. As indicated, the Seminoe Reservoir lies to the west and south of Section 15. Sections 14, 22, and 16 are public domain belonging to the United States. The Hanna-Leo Road, a county road, runs more or less north and south at the eastern edge of Section 14.

In an effort to give the public access to the reservoir area, and at the same time minimize any possible trespass to plaintiff's lands, the Bureau of Land Management proposed to use a pre-existing road that ran westerly from the Hanna-Leo county road in Section 14, crossing the corner of Section 15 into Section 22, and to then relocate the road so as to run westerly across the top of Section 22, which was public domain, and then across the southwest corner of Section 15 into Section 16, again part of the public domain, and thereby gain access to the reservoir.[2]

On or about December 20, 1973, the Bureau began to blade this pre-existing road which ran from the Hanna-Leo Road, a public highway, into Section 14. In this regard, the parties stipulated as follows:

[2]We note, still referring to the appendix, that there apparently is another pre-existing dirt road that cuts off from the Hanna-Leo county road and runs westerly directly through Sections 14, 15, and 16 to the reservoir area. Additionally, the pre-existing dirt road, a portion of which was used by the Bureau of Land Management in the instant case, originally ran westerly through Sections 22 and 21, the latter section also being owned by the plaintiff.

> [BLM] began blading a pre-existing road starting at a county road in the south half of Section 14, Township North, Range 83 West, 6th P.M., on Bureau of Land Management lands, continuing westerly across said Section 14 and crossing the SE corner of Section 15 (fee section of Plaintiff Leo Sheep Company) approximately 30 feet from the Section corner through a pre-existing cattle-guard into Bureau of Land Management Section 22, thence continuing southwesterly approximately 1,000 feet where the blading operation departed the pre-existing road and resumed a westerly course marking a new route to the NW corner of Bureau of Land Management Section 22 co-terminal with the SW corner of Plaintiff Leo Sheep Company Section 15, crossing said SW corner of Section 15 approximately four feet from said section corner, into Bureau of Land Management Section 16 and thence bladed westward to the Shore of Seminoe Reservoir.

As indicated above, both the plaintiff and the Government moved for summary judgment based on a stipulation as to the pertinent facts. To resolve fully what is to us a rather complex problem by summary judgment is perhaps overly ambitious. Be that as it may, the Government's primary position in the trial court, as well as in this court, has been that in the 1862 congressional grant to the Union Pacific Railroad, the plaintiff's predecessor in title, there was an implied reservation of an easement. The trial court concluded as a matter of law that there was no such implied reservation of an easement, nor was there any common law easement by way of necessity, and on this basis entered summary judgment in favor of the plaintiff. Our study of the matter convinces us that the trial court erred in concluding that there was no implied reservation in the congressional grant of 1862.

In its grant to the railroad in 1862, Congress granted the railroad the odd-numbered sections on both sides of the proposed railroad right-of-way extending back from the

right-of-way some 10 miles. In 1864 the legislative grant was doubled to encompass lands lying within 20 miles on each side of the railroad. The even-numbered sections, which were not conveyed to the railroad, continued to be in the public domain. By granting to the railroad the odd-numbered sections, and retaining the even-numbered sections, a checkerboard effect resulted. With some exceptions, odd-numbered sections were surrounded on all four sides by even-numbered sections which were part of the public domain. Similarly, even-numbered sections owned by the Government as public land were also generally surrounded on all four sides by odd-numbered sections granted to the railroad. As a consequence, after the grant in 1862, either the Government had an implied easement to cross land granted the railroad to gain entry into an even-numbered section, or it had to get permission from the railroad to do so on the latter's terms. It is in this context that we must study the congressional grant in 1862 to the railroad of the odd-numbered sections in Carbon County, Wyoming.

A legislative grant of public land is a law as well as a conveyance, and such effect must be given to it as will carry out the intent of Congress. Missouri, Kan. and Tex. Ry. v. Kansas Pac. Ry., 97 U.S. 491 (1878) and Schulenberg v. Harriman, 88 U.S. 44, 62 (1875). Admittedly, there was no express reservation of an easement in the congressional grant of 1862 with which we are here concerned, but appellants contend that the intent of Congress was such that there was an *implied* reservation of an easement of access to the retained sections. In order to determine whether there was an implied reservation of an easement of access, we look solely to the intent of Congress, as such will not be defeated by application of the rules of common law. Missouri, Kan. and Tex. Ry. v. Kansas Pac. Ry., 97 U.S. 491 (1878).

Accordingly, our problem is to ascertain the intent of Congress when in 1862 it granted land in Carbon County to the railroad. The dominant intent behind the grant was not to help, as such, the railroads. The dominant intent, though

not without military overtones, the Civil War being then in progress, was to "open up" the West and develop it. To settle the West, the building of railroads was essential. But to build a railroad was a costly venture, and railroad companies would not build a railroad in what was then a virtual wilderness without financial inducement. And the grant of land by the Government to the railroad was that inducement. United States v. Union Pac. R.R., 91 U.S. 72 (1875).

This and other similar grants were made to give access to the unsettled territories and to encourage settlement and development of those lands. Winona & St. P.R.R. v. Barney, 113 U.S. 618 (1885); Platt v. Union Pac. R.R., 99 U.S. 48 (1878). It was Congress' intent that lands granted, and most certainly lands retained, would eventually be conveyed to private persons who would develop the land and, incidentally, patronize the railroad.

Based on the foregoing analysis, we conclude that in granting land to the Union Pacific Railroad in 1862, Congress by implication intended to reserve an easement to permit access to the even-numbered sections which were surrounded by lands granted the railroad. To hold to the contrary would be to ascribe to Congress a degree of carelessness or lack of foresight which in our view would be unwarranted. If there be no implied reservation, then the grant of the odd-numbered sections rendered inaccessible the interlocking even-numbered sections and such would have thwarted, rather than encouraged, settlement near the railroad. And if it reserved no right of access to the retained even-numbered sections, Congress not only granted the railroad the odd-numbered sections, but also granted the railroad the exclusive use of the even-numbered sections. We find ourselves unable to conclude that such was the intent of Congress.

We believe our conclusion that there was such a congressional intent in 1862 finds support in several decisions of the Supreme Court and also by the enactment by Congress in 1885 of the so-called Unlawful Inclosures Act. 43 U.S.C. § 1061, *et seq*. That act provides, in essence, that "[N]o person, by force, threats, intimidation . . . or any

other unlawful means, shall prevent or obstruct . . . free passage over or through the public lands. . . ."

In Camfield v. United States, 167 U.S. 518 (1897), the Supreme Court upheld the constitutionality of the Unlawful Inclosures Act. The defendants in *Camfield* were all successors-in-interest to land granted the Union Pacific Railroad, and thus in a comparatively large area, including many townships, the defendants owned the odd-numbered sections, with the Government retaining the even-numbered sections as part of the public domain. The defendants had constructed fences a few feet back from the township line in all odd-numbered sections. And in the four surrounding townships, again in the odd-numbered sections, constructed fences a few feet back from the township line. The net effect was that a given township could be completely fenced in.

It was in this setting that the United States brought a suit in equity under the Unlawful Inclosures Act to compel the removal and abatement of fences maintained by the several defendants which had in this manner enclosed some 20,000 acres of public lands. The defense raised was that in each instance the fences had been built on land owned by the defendants and acquired from the railroad and its successors-in-interest. The Supreme Court rejected this defense and upheld the statute under the police power of the state. In thus holding, the Supreme Court commented upon the nature of the grant to the railroad as follows:

> We are not convinced by the argument of counsel for the railway company, who was permitted to file a brief in this case, that the fact that a fence built in the manner indicated will operate incidentally or indirectly to enclose public lands, is a necessary result, which Congress must have foreseen when it made the grants, of the policy of granting odd sections and retaining the even ones as public lands; and that if such a result inures to the damage of the United States it must be ascribed to their improvidence and carelessness in

> so surveying and laying off the public lands, that the portion sold and granted by the Government cannot be enclosed by the purchasers without embracing also in such enclosure the alternate sections reserved by the United States. Carried to its logical conclusion, the inference is that, because Congress chose to aid in the construction of these railroads by donating to them all the odd-numbered sections within certain limits, it thereby intended incidentally to grant them the use for an indefinite time of all the even-numbered sections. It seems but an ill return for the generosity of the Government in granting these roads half its lands to claim that it thereby incidentally granted them the benefit of the whole.

Another Supreme Court decision which sheds light on our present problem is Buford v. Houtz, 133 U.S. 320 (1890). The plaintiffs in *Buford* were cattlemen who owned the odd-numbered sections in a vast tract of land in Utah as successors in interest to the Central Pacific Railroad Company, the latter having itself acquired the land by grant of Congress. The even-numbered sections in the tract were owned by the United States, and the defendant sheepmen had been accustomed to grazing their sheep on these public lands. In so doing, however, the sheep trespassed upon the plaintiffs' lands.

In this setting the plaintiffs in *Buford* brought a bill in equity against the sheepmen, asserting, among other things, that the sheepmen had no "right of way for any of his or their sheep over said lands of plaintiffs, or any part thereof, except over and along the highways aforesaid . . . ." and seeking an injunction. The district court for the then Territory of Utah dismissed the bill for lack of equity. On appeal the Supreme Court for the Territory of Utah affirmed, and the United States Supreme Court in turn affirmed the territorial Supreme Court. In so doing the United States Supreme Court stated that growing out of the custom of nearly a hundred years the defendant sheepmen had an "implied license" to graze their sheep on

the public domain. The Court rejected the contention of the plaintiff cattlemen that the sheepmen should not be permitted to use the public land because in so doing, "their cattle trespass upon the unenclosed lands of plaintiffs." So in *Buford* the Supreme Court held that sheepmen who trailed their sheep across plaintiffs' land in order to get to the public domain were not subject to an injunction. The Court, in balancing the equities, noted that to hold to the contrary would mean that the plaintiff cattlemen, owning approximately 350,000 acres scattered in checkerboard fashion through a large tract consisting of some 921,000 acres, could "exclude" the defendant sheepmen from the whole tract and in effect obtain for themselves a "monopoly" of the entire tract. The Court observed that it was not able to observe any equity in such a result.

A case arising out of Utah, when that state was a part of the Eighth Circuit, has bearing on the present dispute. Mackay v. Uinta Development Co., 219 F. 116 (8th Cir. 1914), involved a dispute between rival groups of sheepmen. Uinta Development Company owned the odd-numbered sections in a large tract of land, having acquired these odd-numbered sections from successors in interest to the Union Pacific Railroad, who in turn had acquired the land by act of Congress. The even-numbered sections remained unoccupied public domain. Mackay on occasion drove his sheep across portions of the land owned by the Uinta Development Company, in getting between his summer and winter ranges. Uinta served notice on Mackay to stay off the odd-numbered sections owned by Uinta. Mackay refused and at the company's instance was arrested for trespass.

Uinta then brought suit against Mackay for damages resulting from Mackay's trailing his sheep across Uinta's land. Mackay counterclaimed for damages resulting from Uinta's wrongful obstruction of his passage and from his arrest and criminal prosecution for trespassing. Upon trial, judgment entered for Uinta and Mackay appealed.

At trial Mackay asked the Court for the following declaration of law:

> [T]hat, if it found from the evidence that the company was in the rightful possession of the odd-numbered sections and did not designate a course for him to follow, then as a licensee of the government he was entitled to select a reasonable way over which to trail his sheep, and if it further found that the way he selected was a reasonable one, and was used for the purpose of driving his sheep to and upon the public domain, then as a matter of law, he would not be liable in damages for crossing the company's sections.

The trial court refused the request for such a declaration. However, on appeal, the Eighth Circuit Court held that the requested declaration was a correct statement of the law. In reversing the trial court the Eighth Circuit, applying a balancing test of its own, stated the problem as follows:

> Mackay claimed the right to trail his sheep over the even-numbered sections of the public domain and to do what else was necessary to secure it without subjecting himself to a charge of trespass. The company admitted his right as to the public domain, but warned him not to go over any of its lands on penalty of prosecution for trespass. The odd-numbered sections touch at their corners and their points of contact, like a point in mathematics, are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. . . . As long as the present policy of the government continues, *all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership.* (Emphasis added.)

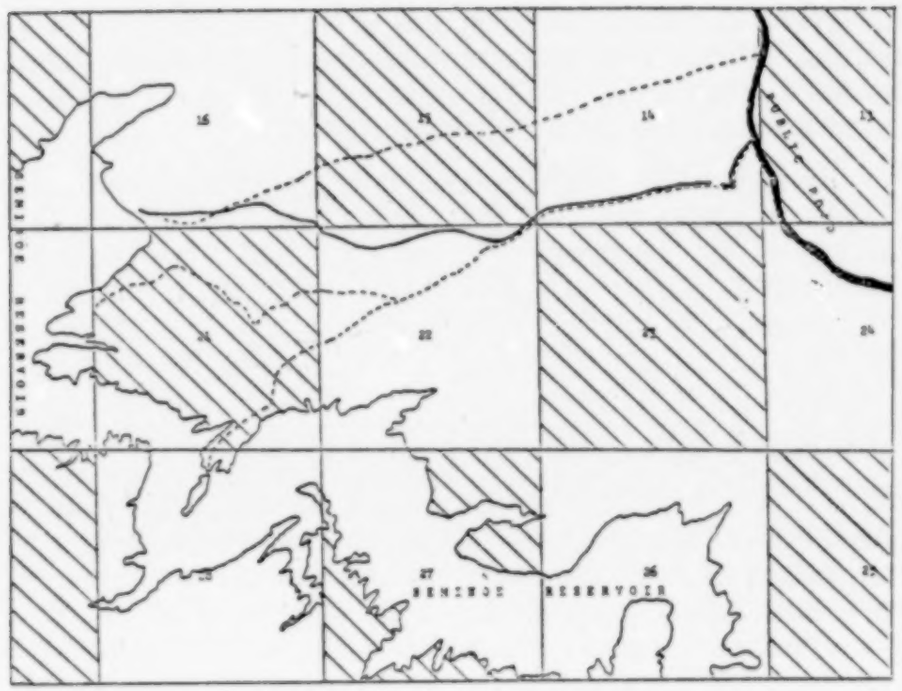
The cases above referred to indicate to us a judicial recognition that Congress, by its 1862 grant to the railroad of the odd-numbered sections, did by implication intend to reserve a right of access to the interlocking even-numbered sections *not* conveyed to the railroad. While none of the above cases uses the term "implied reservation," all recognize the right of the Government and the public to have access to the public domain, and each holds that this right cannot be denied by the fact that the interlocking odd-numbered sections are privately owned. Also, as earlier mentioned, we believe that the Unlawful Inclosures Act, when applied to a checkerboard railroad grant, is itself evidence of congressional recognition in 1885 that there was such an implied reservation in the 1862 railroad grant.

The patent on Section 15, which section is apparently by stipulation serving as an exemplar, did not issue until around 1900, and the patent as issued by the Secretary contained no express reservation of any right of entry. In this regard, the trial court concluded that "the failure of the Secretary to include an express reservation in the patent precludes the Government from subsequently asserting the existence of such limitation [presumably by implication] . . . ." With this we do not agree.

The district court correctly noted that only Congress can condition or limit a title conveyed by patent, and the Secretary of the Interior, as an agent of the Congress, can reserve only what Congress authorizes him to reserve. Shaw v. Kellogg, 170 U.S. 312, 337-38 (1898); Deffeback v. Hawke, 115 U.S. 392, 406 (1885). The inverse of this, however, is also true: A patent cannot convey what has been reserved by law. Swendig v. Washington Water Power Co., 265 U.S. 322 (1924); United States v. Washington, 233 F.2d 811 (9th Cir. 1956). The congressional grant in 1862 itself acted as a transfer, and operates *in praesenti*. Schulenberg v. Harriman, 88 U.S. 44 (1874). The real issue is whether there was an implied reservation in the congressional grant of 1862. We have now held that there was. The absence of an express reservation in the patent did not negative the implied reservation in the earlier grant. A patent is merely evidence of a grant, and the issuing officer acts ministerially, not judicially. United States v. Stone, 69 U.S. 525, 535 (1864); United States v. Washington, 233 F.2d 811 (9th Cir. 1956).

Whether this entire controversy can ultimately be resolved on a summary judgment basis, we do not know. We do know, for example, that the trial court, having concluded that there was no implied reservation, found it unnecessary to consider whether there was any necessity for the preparation and filing of an Environmental Impact Statement. Other issues may also remain. Be that as it may, at the heart of the trial court's ruling was its conclusion that in the congressional grant of 1862 there was no implied reservation. Having satisfied ourselves that in thus holding the trial court misjudged the intent of Congress, the judgment must be reversed and the cause remanded with directions that the trial court take up at that point. The trial court should proceed on the premise that there was an implied reservation of an easement in the congressional grant in 1862 of the odd-numbered sections in Carbon County, Wyoming to the Union Pacific Railroad.

Judgment reversed.



Area Near Seminoe Dam, Carbon County, Wyoming

Odd-numbered sections granted to railroad in 1862 and now owned by plaintiff

Even-numbered sections of public domain

Pre-existing dirt road

Pre-existing dirt road improved by B.L.M. December 1973

Dirt road relocated by B.L.M. December 1973

BARRETT, Circuit Judge, dissenting:

I respectfully dissent. Significantly, the United States did not believe for the past 110 years that it was endowed with the gratuities found in the majority opinion. This is evidenced in the uncontroverted finding of the District Court which goes far to prove the correctness of the decision we reverse: "For 110 years after the grant of the fee lands to the Union Pacific Railroad Company, neither the Department of the Interior nor any other agency or agent of the United States construed the grant or the patents issued pursuant thereto as conferring any right upon the United States, its agents or the public to traverse the lands granted to the railroad, and such administrative construction should be given great weight in the event of doubt concerning the scope of the grant."

It is fundamental that a grant is to be construed strictly against the grantor. Congress did not expressly reserve easements in the grants or patents issued pursuant thereto to reach the even-numbered sections. Such failure precludes judicial legislation. No statutory authorities or common law principles are cited which confer upon the United States the special privilege granted here.

The discussion relative to the Unlawful Inclosures Act, combined with the *Camfield* and *Buford* decisions, lends no credence to the majority's holding that ". . . when applied to a checkerboard railroad grant, is . . . evidence of congressional recognition in 1885 that there was such an implied reservation in the 1862 railroad grant."

The majority opinion does not, in my view, stress the fact that Leo Sheep Company *is not* challenging the right of the United States to obtain the right-of-way across its private land. What the case is all about is whether the United States may *take the private land for access purposes without compensation.* This point is not recognized in the majority opinion. In fact, the observation is made that without the aid of the implied reservation, the grant of

the odd-numbered sections defeated access to the interlocking even-numbered sections.

It is uncontroverted that Leo Sheep Company must employ the condemnation statutes in order to obtain a right-of-way easement over and across the lands of another. Our holding here is that the United States — on the basis of an implied reservation — is a "favored person." In my view the United States is in no better position than Leo Sheep Company. By imposing the public servitude, i.e., the "implied reservation" to use the privately owned lands acquired via the railroad grants for right-of-way easement purposes without the payment of any compensation, we have, I believe, permitted the United States to take private property without compensation in violation of rights guaranteed Leo Sheep Company by the Fifth Amendment to the Constitution.

I would affirm the District Court's judgment, findings and conclusions.

JANUARY TERM — FEBRUARY 28, 1978

Before Honorable Oliver Seth, Circuit Judge,
Honorable William J. Holloway, Jr., Circuit Judge,
Honorable Robert H. McWilliams, Circuit Judge,
Honorable James E. Barrett, Circuit Judge,
Honorable William E. Doyle, Circuit Judge,
Honorable Monroe G. McKay, Circuit Judge,
Honorable James K. Logan, Circuit Judge

LEO SHEEP COMPANY and
PALM LIVESTOCK COMPANY,

Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR,
and CURT BERKLUND, Director,
Bureau of Land Management,

Defendants-Appellants.

No. 76-1138

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc, together with appellants' response to the petition.

Upon consideration whereof, the petition for rehearing is denied, with Judges McWilliams and Doyle, to whom the case was argued and submitted, voting to deny rehearing, and Judge Barrett, also on the hearing panel and who dissented in the opinion filed May 17, 1977, voting to grant rehearing.

Judge Barrett having requested a vote of the active court on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied, with Judges Holloway, McWilliams, Doyle and Logan voting to deny rehearing en banc, and Judges Seth, Barrett and McKay voting to grant rehearing en banc.

An opinion on petition for rehearing is being filed contemporaneously with the entry of this order.

HOWARD K. PHILLIPS
Clerk

By s/Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1138

LEO SHEEP COMPANY, et al., Plaintiffs-Appellees, v. UNITED STATES OF AMERICA, et al., Defendants-Appellants.	Appeal from the United States District Court for the District of Wyoming. (D. C. No. C 74-127)

OPINION ON PETITION FOR REHEARING

Before McWILLIAMS, BARRETT, and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

No. 76-1138, LEO SHEEP CO.
v.
UNITED STATES OF AMERICA

OPINION ON PETITION FOR REHEARING

The appellees seek a rehearing of the case and ask that such rehearing be en banc. As grounds therefor the appellees urge the following: (1) This Court in its opinion assumed substantive facts outside the record; (2) this Court decided the case on an issue which was not presented to or decided by the trial court, i.e., whether Congress intended to and, by implication, did reserve an easement in the 1862 Union Pacific Railroad grant act; (3) the issue of congressional intent in the 1862 Union Pacific Railroad grant act is an issue of fact which should first be determined by the trial court, after both sides are given the opportunity to present evidentiary matter; and (4) this Court erred in its legal conclusion that there was an implied reservation in the 1862 Union Pacific Railroad grant act. We deem none of these matters to warrant a rehearing, and accordingly the petition for rehearing is denied. We shall briefly discuss each of the matters thus urged.

I.

Counsel takes umbrage at the reference in our opinion to Elk Mountain Safari, Inc. and its operations starting in 1965 and asserts that there is no reference to such in the stipulation of facts presented to the trial court. Such is true, though the information concerning Elk Mountain Safari, Inc. is obviously a part of the overall record now before us. Be that as it may, our opinion does not turn on the operations of Elk Mountain Safari, Inc. So, whether the background information concerning Elk Mountain Safari, Inc. was technically before the trial court is really of little moment. The real and only issue resolved by our opinion concerns congressional intent in 1862, not what Elk Mountain Safari, Inc. did in 1965. A factual statement in an appellate court's opinion which finds no support in the record is not grounds for a rehearing where the statement is in no way related to the basis of the decision. United States v. Gorham, 536 F.2d 410 (D.C. Cir. 1976).

II.

In our opinion we stated that the Government's primary position both in this Court as well as in the trial court has been that in the 1862 congressional grant to the Union Pacific Railroad there was an implied reservation of an easement. That statement is not entirely correct. It is true that in this Court the Government did primarily rely on the theory of an implied reservation in the 1862 grant to the Union Pacific Railroad. We stand corrected, and concede that in the trial court the Government did not rely on such a theory. On the contrary it was the appellees who themselves injected the matter into the case, and sought from the trial court a ruling that there was *no* implied reservation in the 1862 congressional grant.

In its pretrial memorandum the appellees framed one of the issues to be resolved as follows:

> 2. Whether United States was authorized to, and did in fact, reserve rights of way across Union Pacific lands for general public access to alternate public domain sections.

The stipulation of facts was couched in more general terms and listed as the first "legal issue" to be decided whether there was an "implied easement across fee lands for reasonable access to public recreation areas." In its proposed findings and conclusions the appellees stated that one issue to be resolved as a "matter of law" was "[w]hether the United States reserved easements on behalf of the public in the patents to the fee lands issued to plaintiffs' predecessors pursuant to the Union Pacific Railroad Grant Act of 1862."

The trial court thereafter made the following conclusion of law:

> 6. Accordingly, this Court concludes that the United States has not reserved or received by grant, expressly or by implication, and does not now have, any right, by easement or otherwise, in the lands of plaintiffs for access to the east bank of Seminoe Reservoir, or for construction of

public roads across the lands of plaintiffs for access to said reservoir and lands, and absent condemnation proceedings and payment of just compensation is without authority to construct such road.

Based on the foregoing, and particularly, of course, based on the conclusions of the trial court itself, we conclude that the question of whether there was an implied reservation was in the case at the trial court level. We will concede that the theory advanced by the Government was not presented to the trial court.* Ordinarily a party may not lose in the trial court on one theory, and later win on appeal under another theory. But the rule is not inflexible and there are exceptions. Schenfield v. Norton Co., 391 F.2d 420 (10th Cir. 1968). We are of the view that the instant case comes within the exception to the general rule, and that the question of congressional intendment in 1862 is a theory that can be raised on appeal, though it was not specifically raised in the trial court.

It is of more than passing interest to note that the appellees in their written brief filed with this court addressed the question of whether there was an express or implied reservation in the Union Pacific Railroad grant act of 1862 on its merits, and the suggestion that the matter should not have been considered by this Court because it was never before the trial court is first advanced in appellees' petition for rehearing.

III.

Appellees assert that the matter of an implied reservation in the congressional grant of 1862 is a question of fact, and that the matter should be remanded to the trial court to conduct an evidentiary hearing thereon and then make its own conclusion, subject to appellate review. In appellees' pretrial memorandum, the stipulation, appellees' proposed findings and conclusions, and the trial court's own conclu-

*Perhaps the shift in legal theory between the trial court and this Court stems from the fact that apparently the Government had different counsel here than in the trial court.

sions, it would appear that all concerned were of the view that the issue of implied reservation posed an issue of law. And that is our view too.

Again it is of interest to note that the suggestion that this case should be remanded for an evidentiary hearing on congressional intent was not made until the petition for rehearing was filed. In its brief appellees made no such suggestion. Apparently they were perfectly welcome to submit the matter to this Court as involving a question of law. Only when they suffered an adverse ruling did the appellees suddenly claim that this was an issue of fact that required an evidentiary hearing.

IV.

The real issue in the petition for rehearing is whether this Court is correct in its conclusion as to congressional intent in the 1862 Union Pacific Railroad grant act. We agree that this is a difficult problem and not one which is free from all doubt. However, in this connection, the petition for rehearing is simply a reargument of the matter. In spite of appellees' dire predictions concerning the consequences of our opinion, should it be allowed to stand, we remain convinced that ours is the proper disposition of the matter. To hold to the contrary would in our view ignore the teaching of Camfield v. United States, 167 U.S. 518 (1896) and Buford v. Houtz, 133 U.S. 320 (1890) and would be at odds with Mackay v. Uinta Development Co., 219 F. 116 (8th Cir. 1914).

Petition for rehearing is denied.

APPENDIX C

I. Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492:

* * *

Sec. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Sec. 4. *And be it further enacted,* That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of

said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: *Provided, however,* That no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

II. Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358:

* * *

Sec. 4. *And be it further enacted,* That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and by inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any preemption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturalist, to be ascertained under such rules as have been or may be established by the commissioner of the general

land-office, in conformity with the provisions of the preëmption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturalist, and such quantity for each settler who claims as a miner, as the said commissioner may establish by general regulation: *Provided, also*, That the phrase "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "an act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land-office.

III. Unlawful Inclosures of Public Lands Act of 1885, 43 U.S.C. §§ 1061-66:

§ 1061.

All inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United

States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and prohibited. Feb. 25, 1885, c. 149, § 1, 23 Stat. 321.

§ 1062.

It shall be the duty of the United States attorney for the proper district, on affidavit filed with him by any citizen of the United States that section 1061 of this title is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also conferred on any United States district court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this chapter; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court. Feb. 25, 1885, c. 149, § 2, 23 Stat. 321; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1948, c. 646, § 1, 62 Stat. 909.

§1063.

No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided,* This section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith. Feb. 25, 1885, c. 149, § 3, 23 Stat. 322.

§1064.

Any person violating any of the provisions of this chapter, whether as owner, part owner, or agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor and fined in a sum not exceeding $1,000, or be imprisoned not exceeding one year, or both, for each offense. Feb. 25, 1885, c. 149, § 4, 23 Stat. 322; Mar. 10, 1908, c. 75, 35 Stat. 40.

§ 1065.

The President is authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of the public lands mentioned in this chapter, and to employ civil or military force as may be necessary for that purpose. Feb. 25, 1885, c. 149, § 5, 23 Stat. 322.

§ 1066.

Where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this chapter without authority from the Secretary of the Interior. Feb. 25, 1885, c. 149, § 6, 23 Stat. 322.

No. 77-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

LEO SHEEP COMPANY AND PALM LIVESTOCK COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, and
DIRECTOR, BUREAU OF LAND MANAGEMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF UNION PACIFIC LAND RESOURCES CORPORATION AND SANTA FE PACIFIC RAILROAD COMPANY AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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June 1978

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Amici have received and filed with the Clerk of the Court letters from counsel for Petitioners and Respondents consenting to the filing of this Brief in Support of the Petition for Certiorari.

OPINIONS BELOW

The opinions below are listed in and appended to the petition for writ of certiorari.[1]

QUESTION PRESENTED

Whether Congress intended to reserve an easement for federal rights-of-way across the lands granted by the United States under the Pacific Railway Act of 1862 as amended ("the Union Pacific Act"), although neither the Act nor its legislative history contains any mention of reserved rights-of-way and the United States has never before claimed any such reservation in the some 110 years since the Act was passed.

STATUTES INVOLVED

The statutes involved are the Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492, *as amended,* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358, and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66, which are appended to the petition for writ of certiorari.

INTERESTS OF AMICI CURIAE

1. *Union Pacific Land Resources Corporation (UPLR).*—UPLR is a wholly-owned subsidiary of Upland Resources Corporation, which in turn is owned by Union Pacific Corporation. Union Pacific Corporation also owns Union Pacific Railroad Company, which operates a 15,800-mile rail system extending from the Missouri River to the Pacific Ocean.

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[1] The appendices contained in the petition for a writ of certiorari are cited here as "Pet. App."

Under the Union Pacific Act, Congress granted to the original Union Pacific Railroad Company ("the Railroad") all the odd-numbered sections of public land within 20 miles of each side of its right-of-way. The even-numbered sections remained in Government hands, creating a checkerboard pattern of private and public ownership in a 40-mile belt across the West. The primary purpose of the grant, which totalled some 18.8 million acres, was to encourage and assist the Railroad in the construction of its rail line. See, *e.g., Platt* v. *Union P. R.R.,* 99 U.S. 48, 59-60 (1878). Over the past century, granted lands have been conveyed and reconveyed in countless transactions, so that they are now held by thousands of private owners including the petitioners in this case.

UPLR presently owns the fee to the entire estate in some 865,000 acres of the granted lands. Although this case is immediately concerned with only some 50,000 acres owned by the petitioners, the decision below directly affects UPLR's holdings as well. The Court of Appeals imputes to the 1862 Congress a heretofore undiscovered intent to reserve an easement for public rights-of-way across *all* the lands granted under the Union Pacific Act. Since UPLR's land-grant holdings far exceed the holdings immediately at issue here, it seems certain that the decision, if allowed to stand, will ultimately have a far greater impact on UPLR than on the petitioners.

2. *Santa Fe Pacific Railroad Company (Santa Fe Pacific).*—Santa Fe Pacific is a wholly-owned subsidiary of Santa Fe Industries, Inc. Santa Fe Industries also owns all the stock of The Atchison, Topeka & Santa Fe Railway Company, which operates a 12,000-mile rail system between Chicago and California.

Santa Fe Pacific holds fee title to some 150,000 acres of the more than 13 million acres originally granted by Congress to the Atlantic & Pacific Railroad Company under the Act of July 27, 1866, ch. 278, § 3, 14 Stat. 292, 294 ("the Santa Fe Act").[2] Like the Union Pacific grant, the Santa Fe grant was of alternate odd-numbered sections and resulted in a checkerboard pattern of private and public ownership of land along the railroad right-of-way.

Although the decision below does not purport to address the intent of Congress in the Santa Fe Act, it nevertheless poses a substantial threat to Santa Fe Pacific's interest in the lands granted under that Act. The Court of Appeals' decision is not based on any express language in the Union Pacific Act or on any underlying legislative history reflecting a congressional intent to reserve an easement for rights-of-way across the granted lands. Santa Fe Pacific is, therefore, confronted with the serious risk that the United States will in due course assert that the court's facile analysis of congressional intent is no less applicable to the Santa Fe grant than it is to the Union Pacific grant. As a result, Santa Fe Pacific also has a significant interest in this case.

STATEMENT OF THE CASE

Amici adopt the petitioners' statement of the case.

REASONS FOR GRANTING THE WRIT

The decision below unsettles titles throughout the West that have been unchallenged, on the point in ques-

[2] The properties of the Atlantic & Pacific Railroad Company were acquired by Santa Fe Pacific pursuant to the Act of March 3, 1897, ch. 374, § 1, 29 Stat. 622, and most of the lands were subsequently conveyed to other private parties.

tion, for more than a century. The Court of Appeals purports to discover a tacit reservation of an easement by the Government in an 1862 land grant that the Government has consistently construed as requiring it to pay compensation for taking such easements. This discovery is made without support in either the statute or the pertinent legislative history and without any suggestion that the United States can make the sort of showing of necessity required to imply a private easement under common law rules. Instead, the decision is based simply on the court's own view that it would have been imprudent for Congress not to reserve such an easement in the Union Pacific grant. Whatever the merits of that view as a matter of original policy, it was not the court's function to make such a judgment, some 110 years after the Act was passed, when generations of private owners have bought, sold and developed the granted lands on the unchallenged assumption that the lands were not subject to public use without consent or compensation.

The full impact of the court's unprecedented holding is not likely to be confined to the some 18 million acres granted under the Union Pacific Act. The United States may well contend in the future that the logic of the decision is equally applicable to the 13 million-acre Santa Fe grant and to other similar federal railroad checkerboard land grants. Such congressional grants in the 19th Century totalled well over 100 million acres,[3] an area equal to the entire land surface of the States of Missouri, Minnesota and Illinois. The decision be-

[3] P. Gates, *History of Public Land Law Development* 384-85 (1968).

low casts a cloud of uncertain scope[4] across the many thousands of private western land titles ultimately founded on these grants.

The Court of Appeals reaches its profoundly unsettling result by taking impermissible advantage of congressional silence to impute an intent that Congress never voiced. In doing so, the court overturns some 110 years of consistent administrative practice and construction, in an area where the need for certainty has long been recognized as paramount, and also seriously misconstrues both the Unlawful Inclosures Act, 43 U.S.C. §§ 1061-66, and prior decisions of this Court. By any measure, the decision below presents a major question of federal statutory construction that should be decided by this Court. Cf. Sup. Ct. R. 19(1)(b).

I. The Decision Below Impermissibly Improvises a Congressional Intent.

A congressional grant of public lands "operates as a law as well as a transfer of the property . . . ." *Schulenberg* v. *Harriman*, 88 U.S. 44, 62 (1875). The intent of Congress must therefore "control in the interpretation" of such a grant.[5] *Wisconsin C. R.R.* v. *Forsythe*,

[4] The Court of Appeals held that Congress "intended to reserve an easement to permit access to the even-numbered sections which were surrounded by lands granted to the railroad." Pet. App. xi. The court made no attempt to delimit the extent or location of the reserved easement. In its reply brief below (p. 4), the United States indicated that it was asserting only a public "right of access over the common interlocking corners" of the private odd-numbered sections and the public even-numbered sections; but the Court of Appeals did not purport to adopt such a limitation.

[5] Thus, the United States could not resort to rules of common law to imply a reserved easement that Congress did not in fact intend to reserve in connection with the grant of lands made in the Union Pacific Act. The common law will recognize an "implied reservation of a way . . . in favor of a grantor" where there is a showing of "necessity" and the grantor "has no other practical means of approach to his lands." *United States* v. *Rindge*, 208 F. 611, 620 (S.D. Cal. 1913); accord, *e.g.*, *Westminster Investing Corp.* v. *Kass*, 266 F. Supp. 597, 599-600 (D.D.C. 1967). Here, the trial court found that the United States cannot make such a showing of necessity, since its "sovereign power of eminent domain permits [it] to condemn such rights-of-way as may be reasonably required for access to any public lands . . . ." Pet. App. v.

159 U.S. 46, 55 (1895). See also, *e.g.*, *Tarpey* v. *Madsen*, 178 U.S. 215, 227 (1900); *United States* v. *Southern P. R.R.*, 146 U.S. 570, 598 (1892).

Consistently with this view, the Court held long ago that the grant of lands made under the Union Pacific Act was subject only to such reservations as Congress had clearly expressed. In *Missouri, K. & T. Ry.* v. *Kansas P. Ry.*, 97 U.S. 491 (1878), the Court said "there can be no reasonable doubt" that Congress' intent in the Act was "to aid in the construction of the railroad by a gift of lands along its route, *without reservation of rights, except such as were specifically mentioned* . . . ." *Id.* at 497 (emphasis added). Since there was no congressional mention of any reservation for the interest asserted in *Missouri, K. & T. Ry.*, the Court concluded that no such reservation had been intended.[6]

[6] *Missouri, K. & T. Ry.* involved conflicting claims to some 90,000 acres of land in Kansas. The Kansas Pacific Railway claimed such land by virtue of a grant made to its predecessor in the Union Pacific Act of 1862; the Missouri, Kansas & Texas Railway claimed the same land under a grant made by Congress on March 3, 1863. This Court held that the Kansas Pacific's title to the disputed lands "took effect by relation as of . . . 1862" upon construction of its road "so as to cut off all intervening claimants *except in cases where reservations were specially made in*" the Union Pacific Act. 97 U.S. at 498 (emphasis added). Since the Act was silent regarding the reservation of "any portion of the designated lands for the purpose of aiding in the construction of other roads" (*id.* at 498-

See also *St. Joseph & D.C. R.R.* v. *Baldwin*, 103 U.S. 426, 430 (1881); *Stuart* v. *Union P. R.R.*, 227 U.S. 342, 353-54 (1913). The same conclusion plainly is required here, for it is likewise impossible to find any congressional mention of the easement now asserted by the United States.

The Court of Appeals admitted that there is "no express reservation of an easement" in the Union Pacific Act. Pet. App. x. On its face, the Act conveys unqualified, absolute title to the granted lands.[7] Nor did the court claim that the legislative history makes any mention of a reservation for easements of way. In fact, the legislative history, like the Act itself, is completely silent regarding a reservation of any such interest.[8] Thus, the pertinent legislative materials provide no basis for any determination that Congress "intended" to reserve rights-of-way over the granted lands. Pet. App. xi.

However, the Court of Appeals was "unable" to accept the conclusion that Congress, despite its silence, had not intended to reserve any right-of-way. Pet. App.

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99), the Court held that full title to the disputed lands "had already passed from the government" to the Kansas Pacific when Congress made its 1863 grant and the Missouri, Kansas & Texas could claim nothing. *Id.* at 500-01.

[7] The Act does contain express exceptions reserving certain types of land from the grant; such express reservations serve only to confirm that Congress did not intend any reservation of an easement. See p. 10, below.

[8] See, *e.g.*, Cong. Globe, 37th Cong., 2d Sess. 1906-13, 2749-62, 2776-89, 2804-18 (1862); Cong. Globe, 38th Cong., 1st Sess. 2376-84, 2395-2404, 2417-24, 3148-56 (1864). To the extent that the legislative materials reflect any congressional consideration of public entry onto the granted lands, those materials indicate that Congress had no intention to reserve any right of access. See p. 10, below.

xi. Lacking support in the pertinent legislative materials, the court declared that the underlying purpose of Congress in aiding the construction of western railroads was "to give access to the unsettled territories and to encourage settlement and development of those lands," and that a reservation for rights-of-way was necessary to effectuate this general purpose. Pet. App. xi. "To hold to the contrary," the court said, "would be to ascribe to Congress a degree of carelessness or lack of foresight which in our view would be unwarranted." Pet. App. xi. In so saying, the court itself supplied an intent that Congress had nowhere expressed.

As a matter of abstract reasoning, a modern court might well conclude that a prudent Congress would have reserved easements for rights-of-way across the lands granted under the Union Pacific Act. But the perspective of the 1862 Congress was quite different (see p. 10 n. 10, below), and it was for that Congress, not for the court below, to determine what specific measures were appropriate to achieve a general underlying purpose such as opening the West.[9] Moreover, even if the intent of Congress in 1862 could properly be divined by speculation rather than by reference to what Congress said, there would be no real difficulty in understanding that it need not have perceived any compelling

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[9] See *Berman* v. *Parker*, 348 U.S. 26, 33 (1954), where this Court held that, so long as the purpose is within Congress' power, "the means by which it will be attained is . . . for Congress to determine." In accordance with this view, it has long been established that, in issuing land patents, administrative authorities cannot reserve what Congress has in fact granted. *E.g.*, *Shaw* v. *Kellogg*, 170 U.S. 312, 337-38 (1898); *Deffeback* v. *Hawke*, 115 U.S. 392, 406 (1885). Certainly, the courts have no greater authority to imply a reservation where Congress intended none.

reason to reserve rights-of-way.[10] Indeed, the West seems to have been opened, settled and developed with some success during the last 110 years, even though the reservation just discovered in the court below was unknown and unasserted (see pp. 13-14, below).

Furthermore, contrary to what the court below implies the 1862 Act in fact reflects close congressional attention to what interests were to be excluded from the grant. The Act expressly excepts from the grant certain categories of lands, including swamplands, homesteads, and lands previously sold or reserved by the United States.[11] And the legislative history shows that Congress specifically considered and rejected a proposed reservation that would have allowed public entry onto the granted lands for limited purposes. See Cong. Globe, 37th Cong., 2d Sess. 1909-10 (1862). In these circumstances, the absence of any express reservation for rights-of-way seems—as this Court has recognized in closely analogous circumstances—"conclusive" that no such reservation was intended. See *St. Joseph &*

[10] It is unlikely that a Congress in 1862, confronted with the task of opening an empty wilderness, perceived rights-of-way for access to interlocking sections as a significant problem. At that time, questions of title posed little, if any, restraint to movement across the vast western lands. Cf. *Buford* v. *Houtz*, 133 U.S. 320, 327-28 (1890). And, to the extent that necessary access to public and private lands was denied, Congress had available its power to acquire rights-of-way by eminent domain. While reservation of rights-of-way might appear to have been the most sensible course to a court looking at a West that is no longer empty, the Act must be construed from the perspective of the Congress that passed it. See, *e.g.*, *Platt* v. *Union P. R.R.*, 99 U.S. 48, 64 (1878).

[11] See Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492, *as amended*, Act of July 2, 1864, ch. 216, § 4, 13 Stat. 358.

D.C. R.R. v. *Baldwin, supra,* 103 U.S. at 430. See also *Stuart* v. *Union P. R.R., supra,* 227 U.S. at 353.[12]

Finally, the court's imposition of its contemporary view on a 19th Century grant is especially troubling because the ultimate issue here is the quality of title to real property. A hundred years of titles to the lands conveyed under the Union Pacific Act are grounded in the fact that, whatever a court thinks Congress ought to have done, neither the Act nor its legislative history contains any mention of a reservation for rights-of-way. The continuing value and marketability of those lands are heavily dependent upon certainty of title.[13] As this Court has previously emphasized, Congress itself "intended" that its land grants "should be of present force, . . . *with reasonable certainty.*" *Tarpey* v. *Madsen,* 178 U.S. 215, 227 (1900) (emphasis added).

This recognized need for certainty is clearly reflected in the Court's determination in *Missouri, K. & T. Ry., supra,* that Congress intended to make an absolute conveyance of the lands granted in the Union Pacific Act, subject only to such reservations "as were *specifically*

[12] In other contexts, Congress has made express provision for the reservation of rights-of-way. See Act of July 24, 1947, ch. 313, 61 Stat. 418 (right-of-way for roads to be reserved in patents issued by United States for Alaskan lands), *repealed by* Alaska Omnibus Act, § 21(d)(7), 73 Stat. 146 (1959); 43 U.S.C. § 945 (right-of-way for canals or ditches to be reserved in patents for certain lands).

[13] Uncertainty of title also impairs development and land use.

mentioned."[14] See p. 7, above. The court below, however, has abandoned the longstanding concern with certainty of title in favor of an approach that would allow grants to be limited and qualified, decades after they were made, on the basis of nothing more than judicial speculation as to what Congress might conceivably have intended but never mentioned. By thus indulging it own notion of sensible policy long after the fact, the court has cast doubt on the titles to millions of acres of land that have passed by congressional grant from public to private hands.

The decision below, therefore, presents precisely the kind of issue of large practical "importance . . . to the utilization" of both private and public lands that calls for exercise of this Court's certiorari jurisdiction. Cf. *United States* v. *Coleman,* 390 U.S. 599, 601 (1968). Moreover, this is not a case where review can reasonably be delayed. Action by this Court must come now if

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[14] The *Missouri, K. & T. Ry.* Court specifically emphasized that its "construction" of the Act should "prevent controversies" in the future over title to granted lands. 97 U.S. at 497-98.

The law has long recognized that where the Federal Government withdraws a tract of land from the public domain for some discrete federal purpose—*e.g.*, an Indian reservation—the withdrawal also includes, by implication, a right to unappropriated water in the adjacent public domain insofar as necessary to accomplish the purpose of the withdrawal. *E.g., Winters* v. *United States,* 207 U.S. 564 (1908); *Arizona* v. *California,* 373 U.S. 546, 598-600 (1963). But that doctrine of implied water rights has no relevance for this case. Here, the issue is not the scope of a federal withdrawal from the public domain, but an asserted limitation on an ostensibly unqualified grant to private parties. This Court has never suggested that a grant may be qualified by unexpressed reservations for rights-of-way or any other interest; and the court below offered no justification for judicial implication of such reservations at this late date.

serious impact from the uncertainty created by the decision below is to be avoided.

II. Longstanding Administrative Practice and Construction Confirm the Unprecedented Character of the Decision Below and the Need for Review.

The trial court found that "[f]or 110 years after the grant of the fee lands" made in the Union Pacific Act, "neither the Department of the Interior nor any other agency . . . of the United States construed the grant . . . as conferring any right upon the United States . . . or the public to traverse the lands granted to the railroad." Pet. App. v. So far as we can determine, the appeal of this case is the first occasion on which the United States has asserted that any public right-of-way was reserved under the Union Pacific grant.[15] Had there been such a reservation, it seems certain that generations of public land officials would have asserted it long before now.[16] The absence of any such "assertion . . . by those who presumably would be

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[15] Even in this case, "the Government did not rely" in the trial court on a "theory of an implied reservation in the 1862 grant to the Union Pacific Railroad"; it was only in the Court of Appeals that the United States invoked such a theory. Pet. App. xxv. Moreover, none of the cases relied on by the court below (Pet. App. xii-xvi) involved an assertion by the United States of a reserved right-of-way. See pp. 17-19, below.

[16] Instead, until this case, the United States has regularly acquired rights-of-way over granted lands by purchase of an appropriate easement or similar interest from the owner. The public land records throughout the West reflect numerous such transactions between the United States and successors of the original Union Pacific Railroad, thus confirming federal land officials' longstanding recognition that no easement of way was reserved by Congress in the Union Pacific Act.

alert" to do so is persuasive evidence that no right-of-way was in fact reserved. Cf. *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941). See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513, 514 (1949).

Indeed, in the past, the Department of the Interior has clearly construed the railroad land grants *not* to reserve any right-of-way over granted lands. In 1887, the Secretary of the Interior recommended to Congress that legislation be enacted establishing a public access highway around each section of western land, with the section lines marking the center of the highway. The Secretary observed that to the extent affected sections had already passed into private hands—as had occurred in the vast areas where alternate sections had been granted to railroads—such legislation "should provide for necessary compensation" for the private property taken.[17]

Thus, in 1887 the Secretary was well aware that Congress had conveyed unqualified title in such grants as the Union Pacific Act and had not reserved easements of way. His construction, unquestioned until this case, is entitled to great weight, especially since it has bees relied on in countless private land transactions. See, *e.g.*, *United States* v. *Union P. Ry.*, 148 U.S. 562, 571-72 (1893); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The Government's sudden reversal in the court below of both this construction and its longstanding administrative practice emphasizes the need for plenary consideration by this Court. Cf. *Patterson* v. *Lamb*, 329 U.S. 539, 541 (1947).

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[17] 1 *Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1887*, at 15 (1887).

III. The Decision Below Seriously Misconceives the Significance for this Case of the Unlawful Inclosures Act and of Prior Decisions of This Court.

The Court of Appeals purported to find support for its unprecedented approach to construing a railroad land grant in the Unlawful Inclosures Act and in decisions of this Court which it believed "recognized the right of the Government and the public to have access [across private lands] to the public domain . . . ." Pet. App. xvi. The court's reliance on these authorities is misplaced.

The court thought that the Unlawful Inclosures Act provided significant "evidence of congressional recognition *in 1885*" that an easement of way was reserved "*in the 1862* railroad grant." Pet. App. xvi & xi (emphasis added). But the issue is not what a Congress sitting in 1885 may have thought concerning reservations in the grant of lands made over twenty years earlier in the Union Pacific Act. The views of a much later Congress acting on entirely different legislation cannot "change the legislative intent" of the Congress that made the Union Pacific grant.[18] See *United States* v. *United Mine Workers*, 330 U.S. 258, 282 (1947). See also *Penn Mutual Life Insurance Co.* v. *Lederer*, 252 U.S. 523, 537-38 (1920). Thus, even if the Unlawful Inclosures Act had reflected some view of the 1885 Congress that an easement of way was reserved in the 1862 grant, that view would be of no relevance in construing the Union Pacific Act.

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[18] This settled rule applies with special force in this case, since the lands granted in the Union Pacific Act had passed from the United States' dominion and control long before Congress enacted the Unlawful Inclosures Act. See, *e.g.*, *Missouri, K. & T. Ry.* v. *Kansas P. Ry.*, *supra*. By 1885, the granted lands occupied no different status than any other private property and Congress' power was limited accordingly.

In any event, neither the Unlawful Inclosures Act nor the underlying legislative history supports the inference drawn by the court below. Both are devoid of any reference to reserved rights-of-way. Instead, the Act is addressed in terms only to unlawful "inclosures of . . . public lands . . . of the United States" and to "prevent[ing] or obstruct[ing] any person from peaceably entering upon . . . or transit[ing] over . . . public lands" by the use of "unlawful means."[19] 43 U.S.C. §§ 1061, 1063.[20] The legislative history shows that the Act was passed, not to create or enforce any right of access over private lands, but rather to outlaw a particular practice by some private owners of "enclosing large areas of lands of the United States [as] trespassers, without a shadow of title to such lands, and surrounding them by barbed wire fences . . . ," thereby monopolizing the public lands and keeping all others off.[21] *Cameron* v. *United States,* 148 U.S. 301, 305 (1893).

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[19] Under the Act, "unlawful means" includes the use of "force, threats, intimidation, . . . fencing or inclosing . . . ." 43 U.S.C. § 1063.

[20] The trial court did not find (Pet. App. i-v) that the petitioners in this case have unlawfully sought to enclose public lands or to prevent the public from moving over such lands. Thus, while the Court of Appeals attempts to inject into this case some flavor of improper interference with access to public lands (Pet. App. vii-viii), it had no basis in the record for doing so. This quiet title action involves no question concerning conduct of the type prescribed in the Unlawful Inclosures Act; the only issue here is whether Congress reserved any right-of-way in the 1862 grant.

[21] For example, Representative Payson, the sponsor of the Act in the House, gave the following explanation of the Act's purpose:

> "[M]illions of acres of the public lands are held and fenced in by people who have no shadow of claim to an acre of them . . . .
>
> . . . . .

The Unlawful Inclosures Act was thus designed to remedy the specific problem of misappropriation of public lands by private parties. As this Court has previously emphasized, the provisions of the Act all "pertain to public lands—not to private lands." *United States* v. *Buchanan,* 232 U.S. 72, 75 (1914).[22] The Act was not concerned with rights in private lands, and it "was not intended to interfere with the use and enjoyment of private property," except where "such use [was] a mere subterfuge for enclosing or preventing access to the public domain."[23] Moreover, the statute is not limited in its application to enclosures involving lands conveyed under railroad grants. In short, the Act provides no evidence at all as to the existence of reserved rights-of-way under such grants.

Nor does this Court's decision in *Camfield* v. *United States,* 167 U.S. 518 (1897), on which the court below relied, reflect any judicial recognition of reserved rights-of-way. That decision merely applied the Un-

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> "It is to open this land up to sale and settlement that this bill is introduced." 15 Cong. Rec. 4769 (1884).

See also S. Rep. No. 979, 48th Cong., 2d Sess. 1 (1885) ("The necessity of additional legislation to protect the public domain against illegal fencing is becoming every day more apparent."); H.R. Rep. No. 1325, 48th Cong., 1st Sess. 7 (1884); 15 Cong. Rec. 4769 (1884) (remarks of Rep. Henley); 15 Cong. Rec. 4770 (1884) (remarks of Mr. Rogers).

[22] See also *Omaechevarria* v. *Idaho,* 245 U.S. 343, 349-50 (1918) (The Unlawful Inclosures Act "was designed to prevent the illegal fencing of public land . . . .").

[23] *United States* v. *Rindge,* 208 F. 611, 623 (S.D. Cal. 1913). See also *Golconda Cattle Co.* v. *United States,* 214 F. 903 (9th Cir. 1914); *Potts* v. *United States,* 114 F. 52 (9th Cir. 1902).

lawful Inclosures Act to the very practice the Act was passed to prevent. Private owners of odd-numbered sections that were originally part of the Union Pacific grant had built fences on their property surrounding even-numbered sections owned by the Government. The fences were useless for enclosing the private lands and could "only have been intended to enclose the lands of the Government."[24] 167 U.S. at 528. In sustaining the application of the Unlawful Inclosures Act to such fences, the court nowhere suggested that there was any reserved right-of-way across the private land.[25] On the contrary, the court made clear that an owner of such land "is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor," and could lawfully fence his property as long as his purpose was to protect that exclusive enjoyment rather than only to monopolize public lands. *Id.* Thus,

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[24] The defendants' fence enclosed a square with six sections of land on each side, containing a total of 36 sections. The fence ran completely around the square, being located just inside the outer section line of the three odd-numbered, privately owned sections on each side and just outside the outer section lines of the three even-numbered, publicly owned sections on each side. See 167 U.S. at 520. Against this background, the Court observed:

> "Defendants are certainly within the letter of [the Unlawful Inclosures Act]. They did enclose public lands of the United States to the amount of 20,000 acres, and there is nothing tending to show that they had any claim or color of title to the same . . . ." *Id.* at 522.

[25] The court was concerned exclusively with the defendants' transparent attempt to enclose and monopolize the affected public lands. See 167 U.S. at 522-28. No question as to the means by which the public might obtain access to the public lands was raised or considered, although—as discussed above—the *Camfield* Court was careful to emphasize that it was not restricting the private owner's right to the "complete and exclusive enjoyment" of his granted lands.

if anything, *Camfield* supports the conclusion that Congress conveyed complete and unqualified title to the lands granted under the Union Pacific Act (see pp. 7-8, above).

The Court of Appeals also misread this Court's decision in *Buford* v. *Houtz,* 133 U.S. 320 (1890), as recognizing an implied right-of-way reservation under the Union Pacific Act. *Buford* was concerned with a 100-year old "custom" allowing sheep to run free and graze upon unenclosed land, whether public or private. See 133 U.S. at 326-31.[26] That ancient custom, which was held to permit sheepmen to trail their stock across unenclosed, private checkerboard lands, has no bearing on whether Congress intended to reserve a very different right of access in the grant at issue here. Nothing in *Buford* suggests otherwise.[27]

The decision below is, therefore, based on a seriously mistaken view as to the import for this case of the Unlawful Inclosures Act and this Court's decisions in *Camfield* and *Buford.* In light of the enormous potential impact of the decisions (see pp. 4-6, above), certiorari is warranted to correct the lower court's error. Cf. *McCandless* v. *Furlaud,* 296 U.S. 140 (1935).

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[26] See also *Lazarus* v. *Phelps,* 152 U.S. 81, 84-85 (1894) (*Buford* recognized the "custom of permitting cattle to run at large without responsibility for their straying upon the lands of others . . . .").

[27] *Mackay* v. *Uinta Development Co.,* 219 F. 116 (8th Cir. 1914), upon which the court below also relied (Pet. App. xiv-xvi), was decided on the basis of *Buford* (see *id.* at 120) and likewise has no relevance for the question whether Congress intended to reserve any right-of-way across the lands granted in the Union Pacific Act.

CONCLUSION

For the reasons stated, amici urge that the petition for writ of certiorari be granted.

Respectfully submitted,

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June 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1686

LEO SHEEP COMPANY and PALM LIVESTOCK COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, and
DIRECTOR, BUREAU OF LAND MANAGEMENT,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION

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BRIEF OF AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION

The American Land Title Association has obtained and filed with the Clerk of the Court letters from counsel for Petitioners and Respondents consenting to the filing of this Brief in Support of the Petition for Certiorari.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Tenth Circuit are reported at 570 F.2d 881, 890, and are reprinted in Appendix B to the Petition for Certiorari.

QUESTIONS PRESENTED

1. Whether land grants made under the Union Pacific Railroad Act of 1862 can properly be construed to have reserved to the United States an implied easement across lands granted under the Act.

2. Whether, in the absence of an express reservation of an easement in the Act, the United States is required by the Fifth Amendment to exercise its sovereign power of eminent domain to obtain a right of way easement across privately owned lands.

3. Whether the United States is precluded under common law doctrines from asserting a right to an implied easement of necessity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution which provides, in pertinent part:

> No person shall be . . . deprived of property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves the Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492, *as amended,* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358, known as the "Union Pacific Act," and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66, which are reprinted in Appendix C to the Petition for Certiorari.

INTERESTS OF AMICUS CURIAE

The American Land Title Association is a national organization representing approximately 2,000 title insurance companies, title companies and abstractors in the United States who search, examine and insure titles to land. The Association and its members have a direct and substantial interest in protecting titles of property owners which have been insured by its member underwriters. Additionally, the Association has a vital interest in promoting the security and stability of land titles generally.

The Court can judicially notice the fact that the majority of lands privately owned in the western states were acquired under Federal grant programs and patents issued pursuant to such grants. Approximately 34.5 million acres of land was originally granted to the Union Pacific Railroad and a substantial portion has been transferred and conveyed to others. The land granted to the Union Pacific alternated in sections with lands retained by the United States and created what is often referred to as "checkerboard" lands. Approximately 131 million acres of land was granted under the Union Pacific Act and other railroad acts.[1] The sweeping implications of the Court of Appeals decision are indicated in the following map which shows that property conveyed to the railroads under land grants extends through more than one-half of the States.

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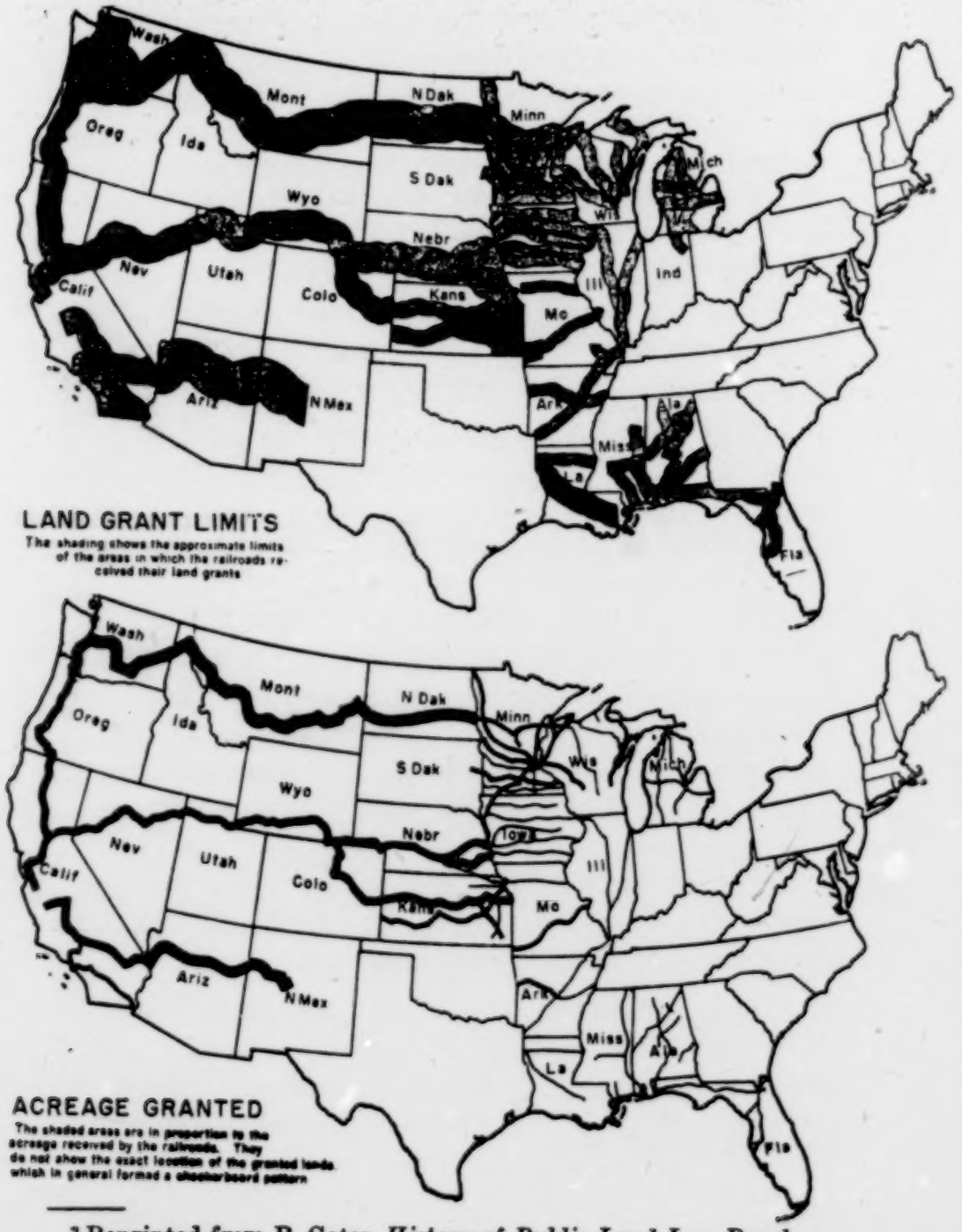
[1] *See,* P. Gates, *History of Public Land Law Development,* 345-46, 356-79, 384-85 (1968).

FEDERAL LAND GRANTS FOR RAILROADS[2]



[2] Reprinted from P. Gates, *History of Public Land Law Development* at 344.

In addition to railroad grants, under similar statutory programs, 17 million acres of land to states and private parties was granted by Congress for the construction of roads, canals and other internal improvements. Thus, without considering lands granted under the Homestead Act, Preemption Acts, and other programs, it becomes apparent that any decision affecting titles derived from the railroad grants has enormous implications.

Owners of millions of acres of land in 29 states have been assured, not only by title insurance companies, but by lawyers' title opinions, that their titles are good subject to defects and encumbrances of record. Since the easement for access to lands retained by the United States has not been a matter of any public record and was not an express reservation in the Act of July 1, 1862, 12 Stat. 489, there was no way for a search of the title to disclose such an encumbrance. Such property has been bought, sold and otherwise transferred for over 110 years with neither actual nor constructive notice of any claim of an implied easement in favor of the United States as a proprietor of retained lands.

Since the decision of the Tenth Circuit does not, by its language, limit its ruling to "checkerboard" lands, it may become a precedent in the statutory construction of other federal (and possibly state) statutes, the Association submits that it is of the utmost importance that the decision be reviewed by this Court.

The present and potential impact of the decision by the Court of Appeals is incapable of measurement at this time. This case purports to involve access to the eastern side of the Seminoe Reservoir which did not exist until nearly 70 years after the grant and patents

to the Union Pacific Railroad. It is not unreasonable to assume that the Federal Government will develop other large recreation areas on public domain lands previously unused or unimproved and attempt to build highways across privately owned property to reach its lands. The language of the Court of Appeals opinion does not limit the nature, purpose, or location of the easement it has concluded must exist over private property on the novel theory that Congress implied a reservation of such an easement in the original Act by omitting any reference thereto; and without considering whether that intention was mutual or merely unilateral.

Thus, the members of this Association as insurers of titles, and attorneys who render opinions as to the state of titles, must hereafter exhibit to prospective transferees of lands derived from federal and state grants, an exception, as an encumbrance on the title, for the claimed easement; and each may very well be subjected to claims for liabilities of staggering amounts to persons who have already received such insurance or opinions.

STATEMENT OF THE CASE

Amicus, American Land Title Association adopts the petitioner's statement of the case.

REASONS FOR GRANTING THE WRIT

By a 2 to 1 vote the Court of Appeals for the Tenth Circuit adopted a judicial construction of the Union Pacific Act of 1862 which operates to create an easement by implication across all odd-numbered sections granted to the railroad under the Act.[3] An easement

[3] References herein to the "Union Pacific Act" or "Act" include amendments enacted in 1864.

of undefined scope, nature, purpose, or location is now imposed on millions of acres of land which was originally granted by Congress to the railroad without regard to the fact that untold numbers of persons have, in the intervening 116 years, acquired the same property as *bona fide* purchasers.

In construing the Act, there was no consideration by the Court of Appeals of the direct and potential adverse impact its decision was likely to have on a vast number of property owners in this country or the effect, as precedent, of its broad holding. If the decision stands it is conceivable that titles to several hundred million acres of land in the West, Midwest, and South will be subject to similar implied easements of access of undefined description, nature and extent. It is reasonably anticipated that the decision below will be cited often for a broad holding that in any grants by Congress, an implied easement was reserved.[4] This result is not prevented by any limitation in the language of the Court of Appeals opinion.

The American Land Title Association recognizes the primary question is whether the Court of Appeals properly construed congressional intent. There are very strong reasons to support a review of the decision on this basis alone. At the same time, as *amicus curiae,* the Association is concerned that a decision having such far-reaching implications and involving important issues of basic property law was decided by the Court of Appeals reviewing a summary judgment predicated

[4] Because so many titles will be affected, the granting of the writ sought by the petitioners may well serve to forestall the filing of a multitude of cases in state and federal courts which otherwise must inevitably occur.

upon a limited stipulation of facts and issues. The Court of Appeals decision and the 4-3 vote to deny rehearing *en banc* reflect the importance of this case of first impression and the uncertainties which attended its decision.

I. In Construing The Union Pacific Railroad Act of 1862 To Have Reserved, By Implication, An Easement Across Lands Conveyed Under The Act, The Court of Appeals Disregarded Fundamental Rules of Statutory Construction

The Court of Appeals recognized that it was bound to look solely to the intent of Congress in 1862 to determine whether an implied easement of access was reserved by the United States. *Missouri, Kan. & T. Ry. Co.* v. *Kan. Pac. Ry. Co.*, 97 U.S. 491 (1878). Nonetheless, in disregard of fundamental rules applicable to ascertaining congressional intent, the Court of Appeals purported to infer such intent from a later enacted statute, the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66, and the decisions of this Court in *Camfield* v. *United States*, 167 U.S. 518 (1897) and *Buford* v. *Houtz*, 133 U.S. 320 (1890).

The Union Pacific Act does not by any words used in the Statute reserve to the United States an easement of access to retained sections across the alternate sections granted to the railroad. Nor do any facts appear in this record even suggesting that the grants were accepted by the railroad with any such understanding. The language of the Act, as amended, is unambiguous. Under the express language of the Act, Congress granted to the railroad

> "... every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad ... and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands ...."[5]

The legislative history is devoid of any reference to easements for rights of way to reach retained lands and provides no basis for inferring an intent inconsistent with the actual language of the Act. This Court has previously refused to interpret the Union Pacific Act in such a way as to imply an intent to reserve rights not expressly reserved in the Act. *Missouri, Kan. and T. Ry. Co.* v. *Kansas Pac. Ry. Co., supra.* It is apparent that Congress was not concerned in 1862 with retaining rights-of-way for access to lands not conveyed to the railroad. The legislative history of the Union Pacific Act and the various grant programs, e.g., the Homestead Act, Preemption Acts and other statutory grant programs to the States demonstrates an intent by Congress to dispose of, and not retain, public

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[5] Act of July 1, 1862, ch. 120, § 3, 12 Stat. 489. The inclusion of express reservations in the original grant negatives an inference of an implied intent to retain an easement. The Amendment of 1864 expanded the grant from five to ten alternate sections per mile on either side of the railroad to a limit of twenty rather than ten miles on each side.

lands.[8] Not until 1891 did Congress indicate an intent to retain public lands when it authorized the President to reserve forest lands. *See*, Act of March 3, 1891, ch. 561, 624, 26 Stat. 1103.

Even if the Union Pacific Act were ambiguous on its face and the legislative history doubtful, the Court of Appeals was obligated to consider and give weight to the administrative history of the Act. *See, United States* v. *Union Pac. R. Co.*, 148 U.S. 562, 571-72 (1893). The Court of Appeals disregarded entirely administrative interpretation and practice under the Act. The dissenting opinion in the Appellate Court succinctly points to the failure of the majority's analysis by noting:

> "Significantly, the United States did not believe lieve for the past 110 years that it was endowed with the gratuities found in the majority opinion. This is evidenced in the uncontroverted finding of the District Court which goes far to prove the correctness of the decision we reverse: 'For 110 years after the grant of the fee lands to the Union Pacific Railroad Company, neither the Department of the Interior nor any other agency or agent of the United States construed the grant or the patents issued pursuant thereto as conferring any right upon the United States, its agents or the public to traverse the lands granted to the railroad, and the administrative construction should be given great weight in the event of doubt concerning the scope of the grant."
>
> 570 F.2d at 889.

[8] Grants of alternate sections of land for railroads, canals and other internal improvements were justified by proponents on the basis that retained sections would have an increased sale value and the government would recover the value of the land donated. *See generally*, P. Gates, *History of Public Land Law Development*, *supra*.

It is settled law that when a Government grant does not reserve a right or interest that would ordinarily pass by the rules of law, and the Government does no act which indicates an intention to make such a reservation, the grant includes all that would pass by it as if it were a private grant.' *Hardin* v. *Jordan*, 140 U.S. 371 (1891); *Stewart* v. *Lamm*, 289 P.2d 916, 918 (Colo. 1955). In its opinion denying rehearing, by a 2-1 vote, the Court of Appeals conceded that the Government itself had not relied on the theory of an implied reservation of an easement in the 1862 grant in the trial court.[9]

This Court long ago held that a statutory construction which disturbs numerous titles should not be adopted unless it is clearly the proper construction. *See, e.g., Doolittle's Lessee* v. *Bryan*, 14 How. 563 (1852) and *Beals* v. *Hale*, 4 How. 37 (1846). The statutory construction adopted by the Court of Appeals is

[7] In *Moore* v. *Robbins*, 96 U.S. 530 (1878) this Court, citing its earlier decision in *United States* v. *Stone*, 2 Wall. 525 (1865) reiterated the view that a patent is the highest evidence of title, conclusive against the government and all claiming under junior patents or titles. Once a patent has issued, assuming it issued under the scope of authority, the Government ceases to have any further control over the land conveyed. As the Court in *Moore* v. *Robbins*, *supra* at 533 noted:

> "If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the Land Office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title."

[9] This concession is significant since the Court of Appeals expressed doubt as to the congressional intent and noted in its opinion that "To resolve fully what is to us a rather complex problem by summary judgment is perhaps overly ambitious." 570 F.2d at 884.

not itself free from doubt. If left to stand it will jeopardize titles of numerous persons who are successors-in-title to the railroads, who have given consideration for their titles, but, who had neither actual nor constructive notice of the servitude which the decision purports to impress on their lands.

II. In The Absence Of An Express Reservation Of An Easement, The United States Is Required By The Fifth Amendment To Exercise Its Power Of Eminent Domain To Take Private Property

Neither the Union Pacific Act nor the patents issued pursuant to the Act expressly reserves to the United States an easement of right-of-way across lands granted to the railroad. The decision of the Court of Appeals operates to take private property without compensation in violation of rights guaranteed by the Fifth Amendment to the United States Constitution. By construing the later enacted Unlawful Inclosures of Public Land Act to establish congressional intent to reserve an implied easement in the Union Pacific Act, the Court of Appeals has circumvented the mandate of the Fifth Amendment.[9]

It is settled law that the United States cannot consistent with due process of law legislate back to itself lands previously granted without making compensation. *Union Pacific R.R. Co.* v. *United States*, 99 U.S. 700, 720 (1879); *See also, United States* v. *Rindge*, 208

[9] For reasons addressed in the petitioner's brief, which are not repeated by this amicus, the Unlawful Inclosures of Public Land Act and cases decided under that Act, i.e., *Camfield* v. *United States, supra*, and *Buford* v. *Houts, supra*, relied on by the Court of Appeals are inapposite and do not support the conclusion reached by the Court below.

F. 611 (S.D.Cal. 1913)."[10] The novel construction imported into the Union Pacific Act by the Court of Appeals accomplishes this unconstitutional result.

The District Court impliedly recognized that petitioners' Fifth Amendment rights to just compensation were being evaded by the Government's actions in concluding that:

> "Easements may not be implied in patents in favor of the United States because the sovereign power of eminent domain permits the United States to condemn such rights of way as may be reasonably required for access to any public lands under Rule 71A, Federal Rules of Civil Procedure."[11]

The Court of Appeals completely ignored the constitutional issue implicit in its decision to impose a public servitude on privately owned lands without payment of compensation. Other courts have rejected claims of easements reserved by implication or easements by necessity on the part of government generally as contrary to rights acquired by patentees of public lands and guaranteed by the Constitution. *See, United States* v. *Rindge, supra* at 619-20; *accord, Pearne* v. *Coal Coke Co.*, 90 Tenn. 619, 18 S.W. 402 (1891); *Bully Hill Copper Mining and Smelting Co.* v. *Bruson*, 4 Cal. App. 180, 87 P. 237 (1906); *Thomas* v. *Morgan*, 113 Okla. 212, 240 P. 735 (1925); *State* v. *Black Bros.*, 116

[10] In *Rindge* the District Court rejected the United States' assertion of an implied reservation of a public right-of-way across patented lands to reach public lands. The issue was ultimately resolved when the Los Angeles legislative body adopted resolutions condemning a portion of the private property thus requiring compensation to the landowner. *See, Rindge Co.* v. *Los Angeles County*, 262 U.S. 700 (1923).

[11] *See, Petitioners' Brief*, Appendix A.

Tex. 615, 297 S.W. 213 (1927); *Guess* v. *Azar*, 57 So.2d 443 (Fla. 1952); *see also, Seaway Co.* v. *Attorney General*, 375 S.W.2d 923 (Tex. 1964).

The Fifth Amendment requires not only payment of just compensation to persons whose property is taken by the United States for public purposes, but that no property be taken without due process of law. The petitioners in this case and thousands of others owning property in railroad land grant areas have been effectively, by the Court of Appeals decision, deprived of one element of their ownership of their land without compensation.

III. The United States Should Be Precluded From Asserting An Easement By Necessity Where Such A Claim Has Not Been Made For Over 110 Years and Where The Claim Is Inconsistent With Common Law Principles

Assuming *arguendo* the Court of Appeals erred in concluding that Congress intended, by implication, to reserve an easement of access to retained lands, the United States is precluded from now attempting to establish a common law easement of necessity.

A common law easement of necessity can be implied only when the necessity existed at the time of the grant. *See*, 3 *Tiffany Real Property*, § 793 (3rd ed. 1939). The Seminoe Reservoir was not in existence in 1862 and therefore the necessity for public access was nonexistent. Further, strict necessity is required to establish an implied easement to remaining lands of a grantor where the grantor has not expressly reserved such an easement. *See, United States* v. *Rindge, supra.*

Implied easements of necessity are not favored where reciprocal benefits are not received by the conveyor and

conveyee. *Restatement of Property* § 476, comment h (1944). It is settled that an easement across public lands cannot be created by implication. *See, Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917); *United States* v. *Union P. R. Co.*, 353 U.S. 112, 116 (1957); *see also, Tarpey* v. *Madsen*, 178 U.S. 215, 227 (1900); *Missouri, Kan. & T. Ry. Co.* v. *Kan. Pac. Ry. Co., supra.* Thus, private landowners should not be compelled to suffer the burdens of such an easement.

If the United States were entitled to claim a common law easement by necessity it would be required to show that there were no alternative means for acquiring access--which it cannot do since it has the power of eminent domain. *See, United States* v. *Rindge, supra.*[11]

The record before the trial court is not sufficient to establish a "way of necessity". There was no showing as to the use of the public lands prior to the conveyance to the railroad to ascertain the extent of the purported easement. *See, Restatement of Property*, § 483, comment i (1944).

The nature of the use which is to be made of the petioners' property is obviously far expanded over any use existing at the time of the grant. However, there was no evidence in the trial court to ascertain whether different or additional uses were permissible, assuming *arguendo* an implied easement may exist.

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[11] The trial court rejected the Government's claim of implied easement by necessity by finding that it had the power of eminent domain. Even if the availability of eminent domain were not the sole criteria, the stipulated facts presented to the trial court do not establish a common law easement.

To the extent the United States may resort to common law rules to create an implied easement of necessity, it should be precluded from asserting such a claim in this case.[13]

Where the United States is acting in a proprietary capacity it should be subject to the same rules which govern transactions between private property owners.[14] The equitable doctrine of estoppel has been applied to preclude the United States from asserting claims where required by justice and fair play. *See, United States* v. *Lazy FC Ranch, supra; see also, Moser* v. *United States, supra; Snake River Ranch* v. *United States,* 395 F.Supp. 886 (D.Wyo. 1975), *aff'd,* 542 F.2d 555 (10th Cir. 1976); *Brandt* v. *Hickel,* 427 F.2d 53 (9th Cir. 1970); *United States* v. *Georgia-Pacific Co.,* 421 F.2d 92 (9th Cir. 1970); *Tonkonogy* v. *United States,* 417 F. Supp. 78 (S.D.N.Y. 1976); *Shell Oil Co.* v. *Kleppe,* 426 F. Supp. 894 (D.Colo. 1977). The petitioners acquired titles as *bona fide* purchasers without notice of the easement first claimed by the United States more than 110 years after the grant to petitioners' predecessor in title. In numerous cases the Court has barred claims by the United States to set

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[13] Implied easements created under common law doctrines must necessarily be subject to common law doctrines applicable to their extinction, e.g., abandonment, estoppel, prescription and adverse possession. *See, Restatement of Property,* §§ 497-505 (1944).

[14] While a stronger case can be made that the equitable defense of estoppel should be applied where the government is acting in its proprietary capacity, it has been held, under certain circumstances that the equitable doctrine of estoppel may be applied where the government is acting in its sovereign capacity. *See, Moser* v. *United States,* 341 U.S. 41 (1951); *Schuster* v. *C.I.R.,* 312 F.2d 311 (9th Cir. 1962); *see also, United States* v. *Lazy FC Ranch,* 481 F.2d 985, 989 n.5 (9th Cir. 1973).

aside patents against such *bona fide* purchasers. *United States* v. *Marshall Silver Mining Company,* 129 U.S. 579, 589 (1889); *United States* v. *Burlington & Mo. Riv. R. R. Co.,* 98 U.S. 334, 342 (1879).

The United States should be barred by laches where it is obvious that property has been conveyed and transferred for many decades without any knowledge that these lands were burdened with a public right-of-way. *See, United States* v. *Fullard-Leo,* 66 F.Supp. 782 (D. Hawaii 1944); *cf., The Falcon,* 19 F.2d 1009 (D. Md. 1927).

In summary, the American Land Title Association respectfully submits that the Court of Appeals seriously erred in finding a congressional intent to reserve an easement in the Union Pacific Act. In the absence of a clear intent by Congress in 1862 to reserve an easement for public access, the United States, at best, could claim only a common law implied easement of necessity. In the record before the trial court there was no evidence to support such an easement which, in any event, would be barred at this late date.

CONCLUSION

For the reasons stated, *amicus* urges that the petition for writ of certiorari be granted.

Respectfully submitted,

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Washington, D.C. 20036
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APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

NO. 77-1686

LEO SHEEP COMPANY AND
PALM LIVESTOCK COMPANY,

Petitioners,

– v. –

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, AND
DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 26, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF WYOMING

No. C74-127

LEO SHEEP COMPANY, PALM LIVESTOCK COMPANY and ELK MOUNTAIN SAFARI, INC.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, ROGERS C. B. MORTON, Secretary of Interior, and BURTON W. SILCOCK, Director, Bureau of Land Management,
Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
Aug. 6, 1974	Complaint filed. Summons and copies issued.
Sept. 19, 1974	Summons with Marshal's return of service by registered mail upon Mr. Morton; Mr. William B. Saxbe, Atty. Gen.; and Mr. Silcock, filed. (on 9-6-74)
Dec. 4, 1974	Answer of defts., filed.
Apr. 17, 1975	Interrogatories propounded to defts. by pltf., filed.
May 9, 1975	Defendant's answers to plaintiff's interrogatories, filed.

June 10, 1975	Defendant's interrogatories to pltf., filed.
June 24, 1975	Second set of interrogatories propounded by pltfs. to defts., filed.
June 24, 1975	Request of pltfs. for production of documents, filed.
June 24, 1975	Separate answer to pltfs.' second set of interrogatories, filed.
June 30, 1975	Order for pre-trial conference on August 1, 1975 at 1:30 P.M., filed, copies to counsel.
July 14, 1975	Answers by pltfs. to interrogatories propounded by defts., filed.
July 22, 1975	Pre-trial memorandum of defts., filed.
July 23, 1975	Pre-trial memorandum of pltfs., filed. List of pltfs.' witnesses and exhibits, filed.
July 24, 1975	Defendants' supplemental exhibits and witnesses, filed.
Aug. 1, 1975	Pre-trial held this date.
Aug. 1, 1975	Order striking trial assignment of August 7, 1975; Parties given 10 days from the date of this order to file stipulations of facts and motions for summary judgment; and parties given 55 days from date of this order to file simultaneous proposed findings of fact and conclusions of law and memoranda brief, filed, copies to counsel.

Aug. 11, 1975	Motion of plaintiffs for summary judgment, filed.
Aug. 11, 1975	Stipulation of facts, filed.
Aug. 11, 1975	Amended Complaint, filed.
Aug. 11, 1975	Notice of dismissal of complaint by plaintiff, Elk Mountain Safari, Inc., filed.
Aug. 11, 1975	Amendment to complaint by plaintiffs Leo Sheep Company and Palm Livestock Company, filed.
Aug. 11, 1975	Certificate of service, filed.
Aug. 11, 1975	Motion for summary judgment by defendants, filed.
Sept. 5, 1975	Answer of defts. to amended complaint, filed.
Sept. 12, 1975	Supplemental exhibit of United States, filed.
Sept. 15, 1975	Motion of pltfs. to strike affirmative defense in Answer to Amended Complaint, filed.
Sept. 26, 1975	Plaintiffs' memorandum in support of motion for summary judgment, filed.
Sept. 26, 1975	Plaintiffs' proposed findings of fact and conclusions of law, filed.
Sept. 26, 1975	Defendants' proposed findings of fact and conclusions of law, filed.

Sept. 26, 1975	Defendants' proposed judgment, filed.
Sept. 26, 1975	Defendants' memorandum of law, filed.
Oct. 15, 1975	Defendants' substituted proposed findings of fact and conclusions of law, filed.
Oct. 15, 1975	Defendants' substituted proposed judgments, filed.
Oct. 15, 1975	Defendants' memorandum supplement, filed.
Oct. 16, 1975	Opposition to motion to strike affirmative defense, with affidavit attached, filed.
Nov. 13, 1975	Findings of fact and conclusions of law supporting plaintiffs' motion for summary judgment, filed, copies to counsel.
Nov. 13, 1975	Summary judgment sustaining motion of plaintiffs for summary judgment and denying motion of defts. for summary judgment, parties to pay own costs, ent. and filed, and copies to counsel.
Jan. 8, 1976	Notice of appeal filed by defts. & copies to counsel & Clerk, U.S.C.A. Denver, Colo.

UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT

No. 76-1138

LEO SHEEP COMPANY and
PALM LIVESTOCK COMPANY,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR,
and CURT BERKLUND, Director,
Bureau of Land Management,
Defendants-Appellants.

DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
Mar. 8, 1976	Cause docketed; record on appeal, Vol. I (pleadings) (345 pp.), orig. Order — docketing statement due 3/18/76 — Lewis
Mar. 10, 1976	Docketing Statement — c/s
May 24, 1976	Record on Appeal — Vol. I
June 1, 1976	Brief of Appellant U.S.A. — c/s
June 22, 1976	Brief of Appellee Leo Sheep Co. — c/s
July 9, 1976	Appellant U.S.A.'s reply brief — c/s
Jan. 26, 1977	Argued and Submitted — McWilliams, Barrett, Doyle

May 17, 1977	Opinion: McWilliams, Barrett, Doyle — PUBLISH JUDGMENT: Reversed and remanded. Judge Barrett dissenting
May 31, 1977	Appellees' petition for rehearing en banc — c/s (to en banc panel)
June 2, 1977	Order: United States is granted until 6/16/77 within which to file an answer to the petition for rehearing and suggestion for rehearing en banc — McWilliams
June 20, 1977	Appellant's response to petition for rehearing — c/s (to panel and en banc panel)
Feb. 28, 1978	Order: Upon consideration, petition for rehearing is denied, suggestion for rehearing en banc is denied. An opinion on petition for rehearing is being filed contemporaneously with the entry of this order. (SEE ORDER BOOK FOR COMPLETE ORDER). En banc panel OPINION: McWilliams, Barrett, Doyle — PUBLISH JUDGMENT: Petition for rehearing is denied
Mar. 8, 1978	Mandate only to District Court Original Record on Appeal to District Court
Mar. 8, 1978	Motion for stay of mandate (Appellee's) — c/s (RECEIVED) (to panel 3/9/78)

Mar. 13, 1978	Order: Upon consideration of the motion of appellees for stay of mandate, filed 3-8-78, which the court treats as a motion for recall of mandate and the stay of it pending application for certiorari, it is the order of the Court as follows: 1. Mandate issued 3-8-78, is recalled. 2. Issuance of the mandate is stayed until 4-12-78, and if on or before that date there is filed with the Clerk of the Court of Appeals for the Tenth Circuit a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari, the stay shall continue until final disposition by the Supreme Court. (McWilliams, Barrett, Doyle)
Mar. 13, 1978	Receipt for original record on appeal Receipt for mandate
Mar. 17, 1978	Mandate returned from district court
Apr. 12, 1978	Appellees' motion for ext. of stay of mandate to 5/29/78 pending certiorari — c/s (to panel 4/12/78)
Apr. 20, 1978	Order: Upon consideration whereof, appellees motion for extension of stay of mandate is granted. Issuance of mandate is stayed to 5/29/78. If on or before that time notice from the Supreme Court is received that certiorari has been filed, stay shall continue until final disposition by Supreme Court. McWilliams, Barrett, Doyle

June 5, 1978	Supreme Court notice of filing of petition for writ of certiorari on 5/26/78 in No. 77-1686
Oct. 5, 1978	Certified copy of Supreme Court order GRANTING certiorari on 10/2/78 in No. 77-1686

NOTE: The following items are not reprinted in this Appendix because they are reproduced as indicated below in Appendices A and B in the petition for writ of certiorari filed by petitioners herein:

Appendix A:

Pages i to v:

Findings of Fact and Conclusions of Law Supporting Plaintiffs' Motion for Summary Judgment, United States District Court for the District of Wyoming

Appendix B:

Pages vi to xx:

Opinion, United States Court of Appeals for the Tenth Circuit

Pages xxi to xxii:

Order Denying Rehearing and Denying Rehearing En Banc, United States Court of Appeals for the Tenth Circuit

Pages xxiii to xxvii:

Opinion on Petition for Rehearing, United States Court of Appeals for the Tenth Circuit

No. 77-1686

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEO SHEEP COMPANY AND PALM LIVESTOCK COMPANY,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

PETER R. STEENLAND, JR.,
EDWARD J. SHAWAKER,
CHARLES E. BIBLOWIT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. B) are reported at 570 F.2d 881. The district court's findings of fact and conclusions of law (Pet. App. A) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1977, and a petition for rehearing with

a suggestion of rehearing *en banc* was denied on February 28, 1977. The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States reserved a right of access to even-numbered sections of land when it granted the Union Pacific Railroad title to odd-numbered sections completely surrounding the retained even-numbered sections.

STATUTES INVOLVED

Sections 3 and 4 of the Act of July 1, 1862, 12 Stat. 492; the Act of July 2, 1864, Section 4, 13 Stat. 358; and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, as amended, 43 U.S.C. 1061-1066, are reprinted in Pet. App. C.

STATEMENT

Petitioners, the owners of certain odd-numbered sections of land in Carbon County, Wyoming, brought this action against the United States and several of its officers for declaratory and injunctive relief under the Quiet Title Act, 28 U.S.C. (Supp. V) 2409a (Pet. 3-4). These odd-numbered sections, which were originally granted by Congress to the Union Pacific Railroad in 1862, alternate in a checkerboard fashion with the even-numbered sections of land that were retained

in the public domain (Pet. App. ii).[1] Petitioners use the even-numbered publicly owned sections for grazing and pasture pursuant to permits issued under Section 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b (*ibid.*).

In 1938, the Bureau of Reclamation built the Seminoe Reservoir on public lands to the west and south of petitioners' lands, and the reservoir and adjacent public lands have been used by the public for hunting and fishing down through the years (Pet. App. vii). In recent years, however, the government began to receive complaints that the public was being denied access to the reservoir area or being required to pay for such access (*ibid.*). Because of the checkerboard pattern of private and public land holdings, it is impossible to reach the reservoir from this direction without crossing some corner of privately owned land (see the map at Pet. App. xviii).

The Department of the Interior attempted to negotiate with the private landowners to secure public access to the reservoir (Pet. App. vii-viii). When these negotiations failed, Interior decided to improve and partially relocate an existing dirt road in the area in order to provide public access to the reservoir from a nearby public highway (Pet. App. viii). In late 1973, the Bureau of Land Management began to "blade" (that is, clear the vegetation from) this road, which was located wholly within the even-num-

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[1] A map of the area is reprinted at Pet. App. xviii.

bered sections of public domain except at two points where it crossed the corners of petitioners' sections as they joined the interlocking public sections (Pet. App. viii-ix, xviii).

Petitioners then brought this quiet title action, contending that the United States had unlawfully entered their property by clearing a pathway across their land at the section corners (Pet. App. vi). The United States in response acknowledged clearing the path and claimed it had the legal right to do so (*ibid.*). Both sides stipulated the facts and moved for summary judgment (Pet. App. vi-vii).

The district court held that the United States had not reserved or obtained any easement or other right to cross petitioners' lands for access to the reservoir, and it granted summary judgment for petitioners (Pet. App. iv-v).

The court of appeals reversed (Pet. App. vi-xx). It held that the 1862 congressional grant of the odd-numbered sections to petitioners' predecessor in interest, the railroad, contained an implied reservation of an easement "to permit access to the even-numbered sections which were surrounded by lands granted the railroad" (Pet. App. xi). Judge Barrett dissented (Pet. App. xix-xx). The court denied a petition for rehearing with a suggestion of rehearing *en banc* in a brief opinion, rejecting petitioners' contentions that the issue of an implied reservation had not been properly raised, or that it presented an issue of fact on which the trial court should conduct an evidentiary hearing (Pet. App. xxvi-xxvii).

ARGUMENT

The decision of the court of appeals is correct, it does not conflict with the decisions of this Court or of any court of appeals, and there is no reason for review by this Court.

1. Petitioners contend (Pet. 9-14) that the court of appeals erred in concluding that Congress impliedly reserved a right of access to the even-numbered sections when it granted the odd-numbered sections to the Union Pacific Railroad.

The Act of July 1, 1862, 12 Stat. 489, 492, as amended by the Act of July 2, 1864, 13 Stat. 356, 358, granted to the Union Pacific Railroad the odd-numbered sections of public land for 20 miles on both sides of the railroad that the Union Pacific was to construct. As the court of appeals recognized (Pet. App. x), a legislative grant of public lands is a law as well as a conveyance, and it must be interpreted so as to carry out the intent of Congress. *Missouri, Kan. and Tex. Ry.* v. *Kansas Pac. Ry.*, 97 U.S. 491, 497; *Schulenberg* v. *Harriman*, 21 Wall. 44, 62. It is well settled that when grants of federal land are at issue, any doubts "are resolved for the Government, not against it." *Andrus* v. *Charlestone Stone Products Co., Inc.*, No. 77-380, decided May 31, 1978 (slip op. 13); *United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 116.

The court of appeals correctly recognized (Pet. App. x-xi) that in making land grants to railroads, Congress intended not only to aid in the construction of the railroad by providing land, but also to encourage

the settlement, development, and eventual sale of the remaining public domain lands. In speaking of the grant Acts involved here, this Court stated in *United States* v. *Union Pacific R.R. Co.*, 91 U.S. 72, 80:

> Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased * * *.

Since Congress made these grants with the intention of promoting the settlement and development of the areas through which the railroads would pass, the court of appeals concluded that Congress did not intend that the retained even-numbered sections of public lands should be made inaccessible and their development thwarted, rather than encouraged, by the grants (Pet. App. xi). Without a right of access, the retained lands would have been rendered virtually useless to anyone but the owner of the surrounding odd-numbered sections.[2] If Congress reserved no right

[2] In contrast, the railroad and its grantees could develop the odd-numbered sections without a similar impediment because of the well-established federal policy of acquiescing in the location of public highways on and across public lands. Section 8 of the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. (1970 ed.) 932, which provided that "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted," was "a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government." *Central Pacific Railway Co.* v. *Alameda County*, 284 U.S. 463, 473. The acquisition of rights of way over public lands for a variety of purposes is now governed by Title V of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2776-2782.

of access, it "not only granted the railroad the odd-numbered sections, but also granted the railroad the exclusive use of the even-numbered sections" (*ibid.*). The court concluded that this had not been the intent of Congress (*ibid.*).[3]

2. Petitioners contend, however, that the court of appeals erred in construing the statute without remanding the case for an evidentiary hearing on the question of Congress's intent, in considering legislative intent without first identifying some specific ambiguity in the legislation, and in concluding, in petitioners' words, that Congress "*must* have intended to reserve an easement" for access to the retained public lands (Pet. 14-15). These contentions are without merit.

a. An evidentiary hearing is not a prerequisite to judicial consideration of materials bearing on legis-

[3] At least two early state cases reached similar results. See *Herrin* v. *Sieben*, 46 Mont. 226, 127 Pac. 323; *Jastro* v. *Francis*, 24 N.M. 127, 172 Pac. 1139, error dismissed, 249 U.S. 581. Contra, *Anthony Wilkinson Live Stock Co.* v. *McIlquam*, 14 Wyo. 209, 83 Pac. 364.

lative intent, such as prior judicial interpretations or legislative materials such as committee reports. Petitioners were free to direct the court of appeals' attention to any such materials, and the record contains no support for their contention (Pet. 15) that the court "disallowed consideration of legislative and administrative history." Indeed, as the court of appeals noted (Pet. App. xxvii), petitioners first suggested that an evidentiary hearing was necessary in their petition for rehearing, after they suffered an adverse ruling on the question of law.

Moreover, petitioners do not dispute the court's conclusion that a major purpose of the grants in question was the development and settlement of the retained public lands, nor do they dispute that lack of a right of access would have thwarted that goal. Even now, petitioners do not identify any materials in the legislative history that they believe the court of appeals overlooked.[4]

b. Petitioners also err in suggesting that before giving any consideration to legislative intent, the court was obliged to identify some specific "ambiguity

[4] *Amici* Union Pacific Land Resources Corporation and Santa Fe Pacific Railroad Company suggest (Br. in Support of Petition, p. 10) that Congress "specifically considered and rejected a proposed reservation that would have allowed public entry onto the granted lands for limited purposes," citing Cong. Globe, 37th Cong., 2d Sess. 1909-1910 (1862). The proposed amendment referred to in this part of the debates did not concern the right of the public to pass across the granted lands to reach the public domain, but rather the public right to mine any valuable minerals discovered on the granted lands.

in the legislative pronouncement" (Pet. 14). This Court has repeatedly stated that no rule of law prohibits resort to an available aid in statutory construction, no matter how clear on its face the statute may appear to be. *E.g.*, *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10; *Cass* v. *United States*, 417 U.S. 72, 77-79.

c. Nor is there merit to petitioners' objection to the court of appeals' common sense conclusion that in view of the legislative aim of the grant, "Congress by implication intended to reserve an easement to permit access to the even-numbered sections * * *," since "[t]o hold to the contrary would be to ascribe to Congress a degree of carelessness or lack of foresight which in our view would be unwarranted" (Pet. App. xi). It is axiomatic that a statute should not be construed to produce an absurd or unreasonable result. *E.g.*, *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543; *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459. This Court recently applied similar common sense reasoning in concluding that although water may be both valuable and a mineral in the literal sense, it is not a "valuable mineral" within the intent of the 1872 federal mining law. *Andrus* v. *Charlestone Stone Products Co., Inc.*, *supra* (slip op. 5-7).

3. Petitioners also err in contending (Pet. 11-15) that the court of appeals' decision misconstrues and contravenes numerous decisions of this Court.

a. Petitioners urge (Pet. 11-12) that the court of appeals' reliance on *Camfield* v. *United States*, 167 U.S. 518, and *Buford* v. *Houtz*, 133 U.S. 320, was misplaced, since neither held that the United States had an easement or a right to build a public road across private lands.

The court of appeals did not suggest that these cases expressly held that Congress intended to reserve an easement in the railroad land grants. As its discussion demonstrates (Pet. App. xi-xiii), the court was well aware of the facts of each case, and it correctly concluded that these cases upheld a right of public access to the public domain, even at the expense of some intrusion on the adjacent privately owned sections. Accordingly, as the court concluded, they support its interpretation of the 1862 grant.

In *Camfield*,[5] landowners who were successors in

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[5] *Camfield* was decided under the Unlawful Inclosures of Public Lands Act, 23 Stat. 321, 43 U.S.C. 1061 *et seq.* Section 3 of this 1885 enactment provides in pertinent part (43 U.S.C. 1063):

> No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct * * * free passage or transit over or through the public lands * * *.

As the court of appeals noted (Pet. App. xvi), the Act evidences legislative recognition of the implied reservation in the earlier railroad grants. By its terms, the statute creates no new rights or interests in lands. Rather, it was designed as remedial legislation to protect rights that Congress had earlier reserved from being defeated by fencing, inclosing, or other means. As this Court has recognized, such subsequent legislation may elucidate the intent of an earlier statute. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380-381.

title to the odd-numbered sections of land originally granted by Congress to the Union Pacific Railroad had constructed a fence on their own property that enclosed a checkerboard area consisting of sections of public domain as well as their own sections. 167 U.S. at 520. In upholding an order to remove the fence—even though it was constructed entirely on private land—the Court's reasoning closely resembled that of the court of appeals in this case (167 U.S. at 526):

> We are not convinced by the argument of counsel for the railway company, who was permitted to file a brief in this case, that the fact that a fence, built in the manner indicated, will operate incidentally or indirectly to enclose public lands, is a necessary result, which Congress must have foreseen when it made the grants, of the policy of granting odd sections and retaining the even ones as public lands; and that if such a result inures to the damage of the United States it must be ascribed to their improvidence and carelessness in so surveying and laying off the public lands, that the portion sold and granted by the Government cannot be enclosed by the purchasers without embracing also in such enclosure the alternate sections reserved by the United States. Carried to its logical conclusion, the inference is that, because Congress chose to aid in the construction of these railroads by donating to them all the odd-numbered sections within certain limits, it thereby intended incidentally to grant them the use for an indefinite time of all the even-numbered sections. It seems but an ill return for the generosity of the Government in granting these roads half its lands to

> claim that it thereby incidentally granted them the benefit of the whole.[6]

Petitioners here did not erect a fence around the perimeter of their checkerboard land holdings, but their refusal to allow access over any corner of their land in order to reach the interlocking sections of public domain operates effectively as an enclosure of those public lands. As the court of appeals pointed out in *Mackay* v. *Uinta Development Co.*, 219 Fed. 116, 118 (C.A. 8), in upholding the right of sheepherders to cross private lands when passing from summer to winter range:

> The odd-numbered sections touch at their corners and their points of contact, like a point in mathematics, are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. As long as the present policy of the government continues, *all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership*. [Emphasis added.]

This Court reached a similar result in *Buford* v. *Houtz*, *supra*, where it held that sheepherders with

[6] Compare the Court's dictum, *id.* at 527-528.

an implied license to graze their herds on public lands would not be enjoined from trailing their herds across the checkerboard sections of private lands as well.

b. Petitioners also contend (Pet. 13-14) that the court of appeals' decision conflicts with a line of cases in this Court "protecting title security and patent defensibility." There is no conflict with cases such as *Smelting Co.* v. *Kemp*, 104 U.S. 636, and *Burke* v. *Southern Pacific Railroad Co.*, 234 U.S. 669. Those cases hold that a federal patent may not be attacked by a showing of irregularities or improprieties in the proceedings leading to its issuance. Nothing of the sort is at issue here.

4. Finally, petitioners suggest (Pet. 7-9) that the decision in this case will unsettle or cloud title to all lands originally granted to the railroads, as well as other lands granted for the construction of roads, canals, and other improvements. They contend that the present decision recognizes easements, "on behalf of lands no longer in public ownership and for benefit of any conceivable activity" (Pet. 8-9), regardless of the development or use of the burdened lands. To the contrary, the court of appeals' decision is a limited one, recognizing only a reasonable right of access across the section corners of privately owned grant lands to reach the interlocking sections of public domain.[7] The status of this right of access once a system

[7] Similarly, a private grantor's intent to reserve an easement by necessity for ingress and egress may be inferred where he retains lands that can be reached only by crossing lands

of public roads has been established in the area to provide access, and once the odd and even-numbered sections have been developed, divided, and conveyed to a variety of purchasers, is not at issue here. Since an implied easement normally terminates when its purpose is accomplished, and may also be terminated by other means, many of the factual situations petitioners posit may well be distinguishable from this case. See 3 Powell, *The Law of Real Property* ¶¶ 422, 421-426 (Rev. ed. 1977).[8]

Moreover, the facts set forth in the petition itself put petitioners' parade of horrors in perspective. This is not an often-recurring issue. As petitioners themselves point out, millions of acres of land were granted to the railroads in the nineteenth century (Pet. 8), much of this land has been settled and developed extensively, and yet there is little precedent on the point at issue here. It appears that few conflicts of this nature have arisen.

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granted to a third party. 3 Powell, *The Law of Real Property* ¶ 410 (Rev. ed. 1977).

[8] See *Camfield* v. *United States*, *supra*, 167 U.S. at 528 (dictum).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1686

LEO SHEEP COMPANY AND
PALM LIVESTOCK COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, AND
DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PETITIONERS

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the District of Wyoming has not been officially reported and is reproduced in Appendix A to the petition for writ of certiorari filed by petitioners herein. The opinions of the United States Court of Appeals for the Tenth Circuit are reported at 570 F.2d 881, 890, and are reproduced in Appendix B to the petition for writ of certiorari.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1). The judgment and opinion of the Court of Appeals were entered on May 17, 1977, and the order and supplemental opinion of that court denying rehearing were entered on February 28, 1978. The petition for writ of certiorari was filed on May 26, 1978 and was granted on October 2, 1978.

STATUTES INVOLVED

The statutes involved are the Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492, *as amended*, Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358 (hereinafter referred to as the "Union Pacific Act"), and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66 (hereinafter referred to as the "Unlawful Inclosures Act"), which are reproduced in Appendix C to the petition for writ of certiorari.

QUESTION PRESENTED

Whether Congress reserved any right of way across odd-numbered sections of land granted in fee to the railroad companies and their assigns pursuant to the Union Pacific Act.

STATEMENT OF THE CASE

On July 1, 1862, Congress enacted the Union Pacific Act providing for federal subsidization of construction of a railroad from the Missouri River to the Pacific Ocean. See *United States v. Union P.R.R.*, 91 U.S. 72 (1875); P. Gates, *History of Public Land Law Development* 362-65 (1968) (hereinafter cited as "Gates"). The Act chartered The Union Pacific Railroad Company and granted it both a 400-foot right of way through the public lands and ten (expanded to twenty by the 1864 amendment) odd-numbered sections of land for each mile of railroad the company constructed from Omaha, Nebraska, to the western border of Nevada, subject only to certain vested rights of third parties and to a reservation of mineral lands by the United States. Act of July 1, 1862, §§ 1-3, 12 Stat. 489-92, *as amended*, Act of July 2, 1864, § 4, 13 Stat. 358. Upon its completion of each segment of forty consecutive miles of the road, the railroad company was to be confirmed in its title to such lands by the issuance of patents thereto. Act of July 1, 1862, § 3, 12 Stat. 492. The Act made similar grants to railroad companies in California, Kansas and Missouri to extend existing rail lines to link with the Union Pacific line at both its ends. See Act of July 1, 1862, §§ 9, 10, 13, 12 Stat. 493-96; Gates at 364.

By thus providing for grant of the odd-numbered sections only, Congress created a "checkerboard" effect of alternating public and private ownership that has subsisted to this day in many parts of the western United States. There is no express reservation in the Union Pacific Act of a right of way over the lands so granted for benefit of the lands retained by the United States.

In this case, petitioners Leo Sheep Company and Palm Livestock Company are successors in fee to The Union Pacific Railroad Company, subject to exceptions and reservations of record, with respect to certain odd-numbered sections of land in Carbon County, Wyoming, lying to the east and south of Seminoe Reservoir. These lands were patented to successors of the Union

Pacific in 1900-03 pursuant to the Union Pacific Act; none of the patents contains any reservation of a right of way in the United States. Pet. App. ii.[1] Petitioners do not own or occupy any part of the right of way granted by the Union Pacific Act and the character of rights granted or reserved therein is not at issue in this case. Petitioners conduct ranching operations on the odd-numbered sections pursuant to their fee titles and on the alternating even-numbered sections of public domain lands checkerboarded with their lands by virtue of grazing licenses issued by the United States pursuant to Section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b, and the regulations promulgated thereunder, 43 C.F.R. § 4115.2-1 (1978).[2] No fences separate petitioners' fee lands from the public domain lands. Pet. App. ii.

This case arose when respondent United States asserted a right to construct, without compensation to petitioners, a road across the fee lands of petitioners for use by the public for access to Seminoe Reservoir. Petitioners denied the right of the United States to construct such a road. Thereafter, commencing on December 20, 1973, without the consent of petitioners or the initiation of condemnation proceedings, the United States constructed a road extending from a local county road to the Reservoir across both public domain lands and fee lands of petitioner Leo Sheep Company. Subsequently, respondent erected signs along this road inviting the public to

[1]References in this brief to "Pet. App." are references to the appendices contained in the petition for writ of certiorari; references to "R." are references to the pages of the District Court record certified herein.

[2]See plat attached to the initial opinion of the Tenth Circuit below, at Pet. App. xviii.

use it for access to the Reservoir and its environs. Pet. App. ii-iii.

Petitioners thereafter initiated this action to quiet their respective titles to the fee lands against the United States, pursuant to 28 U.S.C. § 2409a.[3] At a pretrial conference, the parties stipulated to the facts concerning petitioners' ownership of the fee lands, the construction of the road across the lands of petitioner Leo Sheep Company without permission or compensation, and the absence of any express reservation by the United States of a right of way in the patents to petitioners' lands. R. 107. All parties then moved for summary judgment. R. 106, 208.

On November 13, 1975, the District Court granted petitioners' motion for summary judgment and quieted their respective titles to the fee lands against the United States. The court held that (i) no act or patent of the United States imposed access easements across the fee lands of petitioners for the benefit of public domain lands and (ii) reservations of easements of necessity burdening the fee lands of petitioners could not be implied in the patents to petitioners' predecessors in title because the sovereign power of eminent domain permitted the United States to condemn such rights of way as it might require for access to public lands. Pet. App. v. The court found that for 110 years after the grant of petitioners' fee lands to The Union Pacific Railroad Company in 1862, no offi-

[3]Petitioners' Complaint also sought to require the Secretary of the Interior and the Director of the Bureau of Land Management of the Department of the Interior to prepare and circulate an environmental impact statement prior to construction of roads across the railroad grant lands and prior to permitting substantial increase in public use of the Seminoe Reservoir, pursuant to Section 102(c) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(c).

cer or agent of the United States had construed the grant or the patents issued pursuant thereto as conferring any right in the United States, its agents or the public to traverse such lands without consent of the owners thereof, and held that condemnation was the only permissible means by which the United States could acquire an interest in petitioners' lands. Pet. App. v.[4]

On appeal of respondents, the Court of Appeals for the Tenth Circuit, in a 2-1 decision, reversed the judgment of the District Court. It held that, even though there was no express reservation of a right of way in the Union Pacific Act, Congress must have intended to — and therefore did in fact by implication — make such a reservation from the grant, because "[t]o hold to the contrary would be to ascribe to Congress a degree of carelessness or lack of foresight which in [the court's] view would be unwarranted." Pet. App. xi.

The court did not identify any ambiguity in the language of grant in the Act or the patents and did not point to statutory language, congressional debates or reports, administrative construction, or other indicia of congressional intention to support its conclusion. Nor did it attempt to reconcile its conclusion with the express and unqualified language of grant in the Act. It simply found itself "unable to conclude" that Congress had intended to grant lands to the railroad without reserving a right of access to lands retained by the United States. Pet. App. xi.

Following the decision of the Tenth Circuit, petitioners filed a petition for rehearing with a suggestion for *in banc* consideration. Nine months later, on February 28, 1978, the court denied *in banc* consideration by a 4-3 vote and issued a supplemental opinion denying rehearing. Pet. App. xxi-xxvii.

[4]In light of its decision that the United States had no authority to construct the roads at issue, the District Court declined to determine whether respondents were required to prepare an environmental impact statement. Pet. App. v.

SUMMARY OF ARGUMENT

There is no express reservation of a right of way in the Union Pacific Act or in the patents issued thereunder across the fee lands granted by the Act, and no basis exists for implying one. Under the decisions of this Court, the specific enumeration of other reservations in the Act, coupled with omission of a right-of-way reservation, negates any intention by Congress to reserve some undefined way of passage across the granted lands. The granting of lands by Congress in checkerboard patterns under numerous railway and non-railway acts commencing as early as 1827 without right-of-way reservations in any of them manifests a consistent congressional intention not to reserve rights of way in the checkerboard grants. There was no attention to the question of right-of-way reservations in the legislative history of the Union Pacific Act or, to petitioners' knowledge, in the history of any other checkerboard grant act. The implication of such rights of way was not necesary to achieve the stated purpose of the railroad grant legislation and in fact the railroad grants have been administered consistently for over a century by the United States on the understanding that the grants were absolute and unqualified. In such circumstances, the implication of a reserved right of way over the railroad fee lands constitutes judicial legislation of a kind that has been consistently condemned by decisions of this Court.

But even if a basis existed in 1862 for implication of a reserved right of way in the Union Pacific Act, judicial affirmation of the Government's first assertion thereof over 100 years after the grant would contravene principles of title security long adhered to by this Court and specifically extended by Congress to railway grantees and bona fide purchasers from such grantees. Belated recognition of the rights of way asserted by the Government will unsettle titles to all lands like those of petitioners that rest upon unqualified congressional grants, unqualified patents, unqualified public land records and unrestricted warranties that are based upon such grants, patents and records. If a right-of-way reservation was contained in the land grant legislation, administrative officers of the Government should have expressed such reservation in the numerous patents thereafter issued under the grants and noted its existence on the public land records; they did neither, thereby allowing the lands to be patented, transferred and developed for a century on the basis of unrestricted titles. By attempting now to alter the status of the patents and records to assert such a reservation, they are threatening the integrity of thousands of titles long thought unassailable and thereby destroying the security of all title records derived from the Government. Consistent decisions of this Court, as well as specific congressional legislation, preclude such result.

Decisions and legislation relied upon by the court below to support this belated title challenge by the Government are wholly irrelevant to the title questions presented here. They relate instead to uses of public lands and merely confirm the civil and criminal remedies available to the Government for the unlawful appropriation or

obstruction of such lands. To the extent they have any significance at all for this case, they affirm the right of a patentee and his successors to be free from governmental intrusion upon his lands without payment of just compensation.

ARGUMENT

THE UNITED STATES DID NOT RESERVE EXPRESSLY OR BY IMPLICATION A RIGHT OF WAY ACROSS THE FEE LANDS GRANTED TO THE RAILROAD COMPANIES PURSUANT TO THE UNION PACIFIC ACT.

A. Neither the Language nor the Purpose of the Union Pacific Act Permits an Inference That the United States Reserved a Right of Way Across the Lands Granted.

1. *The Union Pacific Act contains no express reservation of a right of way, and none can be supplied by judicial legislation.*

The Court of Appeals held as a matter of law that rights of way across petitioners' lands were reserved to the United States by implication in the Union Pacific Act. It based that conclusion solely on a presumption that Congress must have intended a reservation but failed inadvertently to express it in the grant. Pet. App. xi.[5] But

[5]The United States did not challenge in the Court of Appeals the conclusion of the District Court that no common law way of necessity could be implied in favor of the United States with respect to the lands granted under the Union Pacific Act because the sovereign power of eminent domain permitted the United States to take such rights of way for access purposes as it reasonably required. Pet. App. v. Since the issue was not addressed by the Court of Appeals, it is not properly before this Court. *Adickes v. S. H. Kress & Co.*,

(Footnote continued next page)

congressional intent in enacting the Union Pacific Act, this Court has said, is subject to "no reasonable doubt. It was to aid in the construction of the road by a gift of lands along its route, *without reservation of rights, except such as were specifically mentioned . . . .*" *Missouri, K. & T. Ry. v. Kansas P. Ry.*, 97 U.S. 491, 497 (1878) (emphasis added).

There is no express reservation in the Act of a right of way across the lands granted. Both courts below recognized that fact. Pet. App. ii, x. The language of grant in the Act contains no exception for easements of access or

398 U.S. 144, 147 n.2 (1970); *Husty v. United States*, 282 U.S. 694, 701-02 (1931); *Magruder v. Drury*, 235 U.S. 106, 113 (1914).

If the issue had been considered below, the court would have been required to affirm the trial court's conclusion on several grounds.

First, courts have refused to imply easements of necessity in favor of the sovereign for the obvious reason that there is simply no *necessity* for such implication when the sovereign can create whatever rights of way it requires by condemnation. See, *e.g.*, *State v. Black Bros.*, 116 Tex. 615, 629-30, 297 S.W. 213, 218-19 (1927); *Pearne v. Coal Creek Min. & Mfg. Co.*, 90 Tenn. 619, 627-28, 18 S.W. 402, 404, (1891); see generally G. Thompson, *Real Property* §§ 362, 364 (1961). Second, if such a way were to be implied in favor of the sovereign, it would have to be reciprocally implied in favor of every grantee from the sovereign and his successors with respect to the surrounding public lands. See *United States v. Rindge*, 208 F. 611, 619 (S.D. Calif. 1913); *Pearne v. Coal Creek Min. & Mfg. Co., supra*; *Guess v. Azar*, 57 So. 2d 443, 445 (Fla. 1952); *Bully Hill Copper Mining & Smelting Co. v. Bruson*, 4 Cal. App. 180, 182-83, 87 P. 237, 238 (1906).

Finally, if the United States were held entitled to a way of necessity over petitioners' land, it would be in a favored position, since Wyoming may no longer recognize such common law easements in the circumstances of this case in light of a state statute providing a means of condemning access on behalf of a landlocked property owner on payment of compensation to the owner of the servient estate. See Wyo. Stat. Ann. §§ 24-9-101 to -104 (1977); *Snell v. Ruppert*, 541 P.2d 1042 (Wyo. 1975); see also *Backhausen v. Mayer*, 204 Wis. 286, 234 N.W. 900 (1931); *Simonson v. McDonald*, 131 Mont. 494, 311 P.2d 982 (1957). Even if the United States is not bound by the decision in *Snell* establishing an incident of state property rights attaching to interests conveyed by the United States (but see *Packer v. Bird*, 137 U.S. 661, 669 (1891)), it would be ironic indeed to hold that the United States, with its undeniable sovereign power to take any access it needs, is entitled to assert a way of necessity in situations where private landowners might not.

any other use; Section 3 provides, in pertinent part:

> *And be it further enacted,* That there be, and is hereby, granted to the said company . . . every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act . . . .

Act of July 1, 1862, § 3, 12 Stat. 492. The only exceptions from the grant specifically mentioned in the Union Pacific Act are mineral lands, Government reservations (*e.g.*, military or Indian reservations), and lands sold, reserved or otherwise disposed of by the United States by preemption, homestead, swamp land or other lawful claim, at the time the route of the road was fixed. Act of July 1, 1862, § 3, 12 Stat. 492, *as amended*, Act of July 2, 1864, § 4, 13 Stat. 358.[6]

In *Missouri, K. & T. Ry., supra,* the Court held that in the face of these explicit reservations, the Act could not be construed to have reserved lands selected by another railroad company under a grant subsequent to the Union Pacific Act, since the Act made no express

[6]The 1864 amendment to the Union Pacific Act expanded the definition of the grant to provide that it

> shall not defeat or impair any preemption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturalist . . . .

Act of July 2, 1864 § 4, 13 Stat. 358.

provision for excepting "from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads." 97 U.S. at 499. Similarly, in *Railroad Co. v. Baldwin*, 103 U.S. 426 (1880), the Court held that the grant of the railroad right of way under an act similar to the Union Pacific Act was absolute and unqualified, and not subject to exception even for lands claimed by private persons prior to location of the route:

> The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. *The fact that none is expressed is conclusive that none exists.*

103 U.S. at 430 (emphasis added). Cf. *United States v. Denver & R.G. Ry.*, 150 U.S. 1, 11 (1893).[7]

Where, as here, the language of a statute is not found to be ambiguous or in any way unclear, a court is not permitted to divine some unexpressed congressional purpose to negate the statutory language employed. See *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 36-37 (1895); *United States v. Missouri P.R.R.*, 278 U.S. 269, 277-78 (1929); *United States v. First National Bank*, 234 U.S. 245, 260, 262 (1914). "[A]ll the reasons that induced [the Act's] enactment and all of its purposes must be

[7]See also *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944) ("Exemptions made in such detail preclude their enlargement by implication."); *Kendall v. United States*, 107 U.S. 123 (1883); *Ebert v. Poston*, 266 U.S. 548, 554 (1925).

supposed to be satisfied and expressed by its words . . . ." *Mackenzie v. Hare*, 239 U.S. 299, 308 (1915). Principles of statutory construction should not become a smokescreen for judicial legislation; the judicial function is "to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry.*, 343 U.S. 562, 575 (1952); see *United States v. Goldenberg*, 168 U.S. 95, 103 (1897) ("No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."); *Hyde v. Shine*, 199 U.S. 62, 78 (1905) ("Where the statute contains no exception, the courts cannot create one."); *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438, 451-52 (1901). Seventy-eight years ago, Justice Harlan described the principles of statutory construction that control the result in this case:

> Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the actual import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed.

Dewey v. United States, 178 U.S. 510, 521 (1900).

It was not the province of the Court of Appeals to

insert into the Act a reservation for a right of way that Congress had neglected to provide for, when the result was to negate express statutory language, and when Congress paid such close attention to the types of interests that were to be excluded from the grant;[8] to do so "would be to legislate and not to construe." *Hobbs v. McLean*, 117 U.S. 567, 579 (1886); cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

2. *Longstanding administrative practice and construction confirm the absence of a reserved right of way in the Union Pacific Act.*

The Court of Appeals did not in its opinion consider the interpretation of the Union Pacific grant by the Interior Department or other federal agencies. However, as pointed out by Judge Barrett in his dissent below, Pet. App. xix, the trial court in this case found that for 110 years no federal agency or official construed the Union Pacific Act to have reserved a right of way over the lands granted for benefit of the lands retained. Pet. App. v.[9] The absence of any such construction by "those who presumably would be alert" to have asserted it is itself an indication that no right of way was reserved. *F.T.C. v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941); see also *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498,

[8]In addition to the express reservations in the Act for mineral lands and lands previously disposed of under the public land laws, Congress did consider and reject an amendment to the Act that would have permitted access to the granted lands for mining purposes. Cong. Globe, 37th Cong., 2d Sess. 1909-10 (1862).

[9]Indeed, the United States did not even contend in the trial court in this case that a right of way reservation should be implied in the Union Pacific Act by reason of congressional intent, as the Court of Appeals recognized. Pet. App. xxv.

513-14 (1949).

Beyond this, however, the Secretary of the Interior expressly determined nearly a century ago that nothing in either the Union Pacific Act or the Unlawful Inclosures Act permitted the United States to construct roads across the lands granted to the railroads without payment of just compensation in accordance with constitutional requirements. In his annual report to Congress in 1887, the Secretary recommended that Congress enact legislation establishing a public highway around each section of public land retained by the government, with the section lines at the center, to provide access to the public sections; to the extent that land to be taken for such highways had already passed from the Government into the hands of private parties, the Secretary observed, "the bill should provide for necesary compensation." 1 *Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1887*, at 15 (1887); see also 1 *Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1888*, at xvii (1888). This interpretation has been confirmed countless times by the issuance of thousands of patents to checkerboard grant lands by Government agents without reservation of any right of way therein.

As a nearly contemporaneous, consistent and longstanding construction of the railroad grants by the official most concerned with its implementation, therefore, it was entitled to great weight in construction of the grants, see *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Great N. Ry. v. United States*, 315 U.S. 262, 275 (1942); *United States v. Healey*, 160 U.S. 136, 141 (1895), especially since it confirmed the existing record and adoption of the opposite construction "would disturb titles derived from such

[grants], and lead to great confusion and litigation." *Iron Silver Mining Co. v. Elgin Mining & Smelting Co.*, 118 U.S. 196, 208 (1886); see *United States v. Union P. Ry.*, 148 U.S. 562, 572 (1893); *Louisiana v. Garfield*, 211 U.S. 70, 76 (1908). Where, as here, vast numbers of people have acquired their lands on the basis of this administrative construction, it should not be rejected unless it is "plainly or palpably wrong," *Hewitt v. Schultz*, 180 U.S. 139, 157 (1900), a conclusion plainly inappropriate here in light of the statutory language and decisions of this Court described above supporting the administrative practice.

3. *The purpose of the Union Pacific Act, as reflected in its legislative history, provides no support for implication of a reserved right of way.*

The Court of Appeals managed to qualify the absolute and unconditional language of grant in the Union Pacific Act, despite the statutory language, decisions of this Court, and administrative construction confirming the absence of any such limitation, by identifying a legislative purpose of the Union Pacific Act to be the settlement of the West and assuming from this (i) that Congress used a checkerboard pattern of grant in furtherance of that purpose, (ii) that prudent policy would have dictated reservation of rights of way over the granted lands, and (iii) that the legislative purpose required effectuating that policy by judicial implication in 1977 of rights of way in the 1862 grant. These assumptions are all erroneous.

First, the checkerboard pattern of grant was initiated long before the Union Pacific Act for purposes unrelated

to those manifested by that Act. Congress first utilized the device in 1827 in grants to states for internal improvements, on the theory that the value of the lands granted could be recouped by retaining contiguous lands which would presumably be enhanced in value by the construction of the improvements; the first railroad grant, in 1850, merely continued the established pattern, for the same stated reason, and the Union Pacific Act differed in form from the numerous grants of the 1850's only in its provision for direct grant to the railroad companies instead of to the states as conduits for the grant.[10] Re-

[10]The first congressional donation of land in support of internal improvements was the Act of February 28, 1823, ch. 16, 3 Stat. 727, which granted a tract of land 120 feet wide, together with one mile of land on each side thereof, to the State of Ohio for construction of a road. In 1824 Congress granted a strip of land to the State of Indiana for construction of a canal and provided for the reservation from sale of every section through which the canal route should pass. Act of May 26, 1824, ch. 165, 4 Stat. 47. Three years later, Congress inaugurated the alternate-section principle in connection with the same canal, granting the State of Indiana "a quantity of land equal to one half of five sections in width, on each side of said canal, and reserving each alternate section to the United States . . . ." Act of March 2, 1827, ch. 56, 4 Stat. 36; see Gates at 345, 347. A companion measure granted to the State of Ohio "one half of a quantity of land equal to two sections" on one side of a road to be constructed by the state, reserving each alternate section to the United States. Act of March 3, 1827, ch. 31, 4 Stat. 242.

By 1850 the principle of granting alternate sections was firmly established, although it had been primarily employed in connection with grants for canal construction. See Gates at 345-56. In that year, Congress enacted the first railroad land grant act, to the States of Illinois, Mississippi and Alabama, an act that was taken as a model for nearly all future railroad land grants to the states and private companies. See J. Sanborn, *Congressional Grants of Land in Aid of Railways* 76-77 (1899); Gates at 356-69. It granted a 100-foot right of way together with half the land in even-numbered sections (after 1853, the odd-numbered sections were granted) within six miles of the railroad line, provided that the reserved odd-numbered sections should not be sold and provided that, if the railroad were not completed within 10 years, title to lands remaining unsold at that time would revert to the United States. Act of September 20, 1850, ch. 61, §§ 2, 3, 5, 9 Stat. 466-67. The sponsor of the bill, Senator Douglas of Illinois, explaining the provisions relating to the grant of alternate sections, described it as "an old practice, long sanctioned by the Government." Cong. Globe, 31st Cong., 1st Sess. 843 (April 29, 1850).

(Footnote continued next page)

tention of the even-numbered sections by the Government for possible development and sale was not the *purpose* of the railroad grant legislation, as the Court of Appeals thought, but was merely a byproduct of the mechanism adopted by Congress to finance great public improvements.

Second, although it may have seemed now to the Court of Appeals that a prudent Congress would have provided for reservation of rights of way in the 1862 Union Pacific grant, legislative intent must be determined under the circumstances existing as of the time of the grant, not by applying judicial notions of wise policy based on 115 years of change. See, *e.g.*, *Mobile & O.R.R. v. State of Tennessee*, 153 U.S. 486, 502 (1894); *Platt v. Union P.R.R.*, 99 U.S. 48, 64 (1878). The fact is that despite 35 years of past experience with checkerboard land grants, Congress inserted no reservation of a right of way in the Union Pacific Act, or, to petitioners' knowledge, in any other congressional railroad grant, and there was no discussion of the access question in any congressional debate or report. See, *e.g.*, Cong. Globe, 37th Cong., 2d Sess. 1906-13, 2749-62, 2776-89, 2804-18 (1862); Cong. Globe, 38th Cong., 1st Sess. 2376-84, 2395-2404, 2417-24, 3148-56 (1864). Congress was simply not concerned with the question, no doubt assuming that any access impediment that did in fact occur could have easily been remedied by exercise of the sovereign power of eminent domain. See *Northern P. Ry. v. Townsend*, 190 U.S. 267, 272 (1903); see also note 19, *infra*. In such circumstances, it was improper for the court below to indulge its own notions of sensible policy by inferring a

Following the 1850 grant, Congress granted millions of acres to the states and private companies on a checkerboard basis for construction of various roads throughout the United States, including between 100 and 110 million acres promised to the four transcontinental railroads sponsored by Congress between 1862 and 1871. See Gates at 360-68, 373-79, 384-85.

congressional intention that simply did not exist.

Third, no right-of-way reservation was contained in any of the patents to the Union Pacific lands or was noted on the public land records with respect to such lands, the United States did not assert the existence of such a right of way for some 110 years following the grant, and no apparent impediment to the settlement of the West has occurred during the many years that the claimed right of way lay dormant. The time to imply the reservation to effectuate the congressional purpose identified by the Court of Appeals was at the time of construction and early operation of the railroad, when the West was empty, not 100 years later when the supposed legislative objective has long since been accomplished.

Finally, the legislative purpose of settling the West, as with the other public purposes to be served by completion of the transcontinental line, does not furnish the yardstick by which this Court has said the scope of the grant must be measured. Rather, the Court has held that the "overshadowing motive that dictated the act of 1862" was to induce private capital to construct the road.[11] *Platt*

[11]Although proposals for a transcontinental railroad had surfaced as early as the 1830's, and were debated by the public and in the Congress with intensity, see Gates at 362-63, 373-74, it was the Civil War that provided the impetus and opportunity for the Union Pacific Act. Congress became concerned for the safety of the Pacific states and thought that their protection "could be done in no better way than by the construction of a railroad across the continent [which] would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies." *United States v. Union P.R.R.*, 91 U.S. 72, 80 (1875). In addition, the road would facilitate utilization of the "vast unpeopled territory lying between the Missouri and Sacramento Rivers" by permitting development of the agricultural and mineral resources of that territory and the making of settlements "where settlements were possible," and would satisfy the pressing need "of an improved and cheaper method for the transportation of the mails, and of supplies for th army and the Indians." 91 U.S. at 80.

v. Union P.R.R., 99 U.S. 48, 59 (1878); see *United States v. Union P.R.R.*, 91 U.S. 72, 81 (1875). This was the purpose of Congress, "above all others"; it was

> [o]nly for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise . . . . [T]he *paramount* intention of Congress was to give such assistance to the company as to induce them to build the road. Every other consideration was subordinate to that.

Platt v. Union P.R.R., supra, 99 U.S. at 60 (emphasis added).

This purpose, as the Court noted in *United States v. Union P.R.R., supra,* 91 U.S. at 82, is reflected in the title to the Act: "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure the Government the Use of the Same for Postal, Military, and Other Purposes." The granting clause itself recites that the grant of alternate sections was made "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon . . . ." Act of July 1, 1862, § 3, 12 Stat. 492. See also Act of July 1, 1862, § 18, 12 Stat. 497. The 1864 amendment to the Act granted new privileges and greater rights to the railroad companies when it became apparent that the benefits offered by the 1862 legislation had not provided sufficient inducement to cause the road to be built. See *Platt v. Union P.R.R., supra,* 99 U.S. at 59-60.

For this reason, the Court in *Missouri, K. & T. Ry., supra,* refused to imply reservations from the grant in addition to those expressly provided by Congress, and in *Platt v. Union P.R.R., supra,* upheld the wholesale mortgaging of the lands by The Union Pacific Railroad Company to finance construction as a "disposition" of the lands within the meaning of the Act that prevented their forfeiture for nondisposition within three years from completion of the road. See Act of July 1, 1862, § 3, 12 Stat. 492. In light of this congressional purpose, the Court has held that the railroad grant legislation should receive a "liberal construction in favor of the purposes for which it was enacted," and is not to be construed "to withhold what is given either expressly or by necessary or fair implication." *United States v. Denver & R.G. Ry.*, 150 U.S. 1, 14 (1893); see also *Russell v. Sebastian,* 233 U.S. 195, 205 (1914); *Nadeau v. Union P.R.R.*, 253 U.S. 442, 444 (1920).[12]

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[12]In the *Denver & Rio Grande* case, the Court interpreted a railroad grant similar to the Union Pacific Act to permit the railroad company to utilize timber taken from public lands adjacent to the route of the road for the purpose of constructing railroad facilities distant from the places where the timber was taken, under statutory language permitting the taking of timber and other material from public lands "adjacent" to the road that was "necessary for the construction thereof." Plaintiff argued that the railroad company was limited by the act to utilizing the materials on lands near their source and that they could not, in any event, be utilized for the construction of auxiliary facilities such as depots, section houses, stock yards, etc. With respect to the first contention, the Court held that the failure of the act to contain any limitation on place of use, in light of the statutory purpose of aiding the company in its construction of the road, precluded implying such a restriction: "If Congress had intended to impose any such restriction upon the use of timber or other material taken from adjacent public lands, it should have been so expressed." 150 U.S. at 11. With respect to the second argument, the Court held that the legislative purpose to aid in the construction of the road included all structures necessary to its operation; acknowledging the "well settled rule of this court that public grants are construed strictly against the grantees," the Court nevertheless held that such grants "are not to be so construed as

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Accordingly, plain statutory language, longstanding administrative practice, and explicit legislative history confirm the decision of this Court that the congressional purpose was to aid construction of the road "by a gift of lands along its route, without reservation of rights, except such as were specifically mentioned." *Missouri, K. & T. Ry. v. Kansas P. Ry., supra,* 97 U.S. at 497. No right-of-way reservation was specifically mentioned in the Union Pacific Act, and therefore no such reservation can be held to exist.

B. *Judicial Implication of Reservations in Unconditional Government Grants Would Contravene Decisions of This Court Protecting Title Security and Would Cloud Innumerable Titles Long Thought Unassailable.*

Under the Union Pacific Act, some 34,000,000 acres of lands were granted by Congress to the Union Pacific and other roads. See Gates at 367. By similar legislation in 1864, Congress granted more than 45,000,000 acres to the Northern Pacific Railroad Company for construction of a northern route to the Pacific. Act of July 2, 1864, ch. 217, 13 Stat. 365; see Gates at 374. In all, over 131,000,000 acres of land were granted either directly to the railroad companies or to western and southern states for ultimate disposition to the companies, and another 17,000,000 acres were granted to the states for roads, canals and other improvements. See *id.* at 379, 384-85. Virtually all this acreage was granted on the "checkerboard" pattern at issue in this case. See note 10, *supra.* No patent to any of this acreage, to petitioners' knowledge, reserved

to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication," and held that a "liberal construction" of the grant permitted the railroad company to utilize the timber and other materials for construction of auxiliary facilities. 150 U.S. at 14.

to the United States the rights it now claims to have been implicit in the Union Pacific Act or other checkerboard land grant acts.

A patent is the instrument which provides documentary evidence of the federal grant and confirms that all action necessary to perfect title thereto has been taken by the grantee or his successors. See *Langdeau v. Hanes,* 88 U.S. (21 Wall.) 521, 529 (1874); *Deseret Salt Co. v. Tarpey,* 142 U.S. 141 (1891); *St. Paul & P.R.R. v. Northern P.R.R.,* 139 U.S. 1, 6 (1891). It carries "the implication that all determinations essential to the passing of title have been made." *West v. Standard Oil Co.,* 265 U.S. 200, 214 (1929); see *United States v. Coronado Beach Co.,* 255 U.S. 472, 488 (1921). Consequently, it is through the recognition of a patent "as a record of the government that its security and protection chiefly lie." *Beard v. Federy,* 70 U.S. (3 Wall.) 478, 492 (1865). It is the "unassailable character" of a patent which "gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces." *Smelting Co. v. Kemp,* 104 U.S. 636, 641 (1881). It cannot grant what Congress has not authorized; it cannot reserve expressly or by implication that which the Congress has granted. *Shaw v. Kellogg,* 170 U.S. 312, 337-38 (1898); *Deffebacke v. Hawke,* 115 U.S. 392, 406 (1885); *Swendig v. Washington Water Power Co.,* 265 U.S. 322, 332 (1924).

In this case, as is true with respect to all the checkerboard grant legislation, the patents confirmed the grants without any right of way reservation, were so noted in the public land records and became the muniments of private titles. No prospective purchaser of the lands covered thereby could have found a right-of-way reservation

from examining either the underlying legislation, the patents or the public land records over the 75 years following the issuance of the patents. The decision below, implying the existence of an unexpressed reservation in all such patents, would impair the rights not only of the patentees but also of bona fide purchasers succeeding to their titles, long after the time when the rights of both groups had become unassailable under decisions of this Court and the specific mandate of Congress.

The Court has consistently rejected construction of congressional grants that would render the titles derived therefrom uncertain or open to challenge.[13] In the context of the railroad grants in particular, the Court has had frequent occasion to emphasize the importance of the documentary title record in confirming the titles of the

[13]The Court has long emphasized the importance of the security of titles as a factor in statutory interpretation. When, for example, a statutory construction would be permissible but would "disturb numerous titles," the Court has held that it is not to be adopted unless it is "clearly the proper one." *Beals v. Hale*, 45 U.S. (4 How.) 37, 53 (1846). When a statute has long existed and many titles have been founded on its consistent construction, the Court has cautioned, a court must be "even astute in avoiding a [different] construction which may be productive of much litigation and insecurity of titles." *Lessee of Doolittle v. Bryan*, 55 U.S. (14 How.) 563, 567 (1852). See *Iron Silver Mining Co. v. Elgin Mining & Smelting Co.*, 118 U.S. 196 (1886); *Louisiana v. Garfield*, 211 U.S. 70, 76 (1908).

The Court has also long recognized that "the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, [and] the immense importance and necessity of the stability of titles dependent upon these instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are . . . sustained by . . . that class of evidence which commands respect, and that amount of it which produces conviction . . . ." *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381 (1887); see *Wright-Blodgett Co. v. United States*, 236 U.S. 397, 403 (1915).

Even the court below conceded that the issue of congressional intent in the Union Pacific Act was "not one which is free from all doubt." Pet. App. xxvii.

railroads and their grantees. For example, the Court has held that the Union Pacific Act did not reserve lands along the route claimed by another company under a subsequent railroad grant, because no such reservation was "specifically mentioned" in the Act. *Missouri, K. & T. Ry. v. Kansas P. Ry.*, 97 U.S. 491, 497 (1878). See pp. 10-12, *supra*. Similarly, in *Van Wyck v. Knevals*, 106 U.S. 360 (1882), and *Kansas P. Ry. v. Dunmeyer*, 113 U.S. 629 (1885), the Court determined that the time when the title of the railroad company vested was that of the filing of the ways of definite location of the route in the General Land Office, so that oral testimony of the time of surveying and marking the route on the ground with respect to each section of land was unnecessary and that there was established "a date at which, by record, the title of the railroad company could be considered as definitely ascertained." *Tarpey v. Madsen*, 178 U.S. 215, 223 (1900). This requirement of record filing was also extended by the Court in a series of decisions to individuals entering upon lands ultimately included within the boundaries of a railroad grant, so that the lands reserved from the grant were only those on which proper filings in the local land office had been made at the time the map of definite location was filed. See *Tarpey v. Madsen, supra; Northern P.R.R. v. Colburn*, 164 U.S. 383 (1896); *Whitney v. Taylor*, 158 U.S. 85, 94 (1895).

In *Tarpey*, the Court explained the rationale of these decisions:

> . . . Congress in making a grant to a railroad company intended that it should be of present force, and of force with reasonable certainty. It meant a substantial present donation of something which the rail-

> road company could at once use, and use with knowledge of that which it had received. It cannot be supposed that Congress contemplated that, as in this case, a score of years after the line of definite location had been fixed and made a matter of record, some one should take possession of a tract apparently granted, and defeat the company's record title by oral testimony, that at the time of the filing of the map of definite location there was an actual though departed occupant of the tract, and therefore that the title to it never passed.

178 U.S. at 227. If the rule were otherwise, the Court observed, "the time will never come at which it can be certain that the railroad company has acquired an indefeasible title to any tract." 178 U.S. at 228-29.

Similarly, in *Burke v. Southern P.R.R.*, 234 U.S. 669 (1914), the Court held that the reservation in a railroad grant of "mineral lands" was a reservation of only those lands actually identified as mineral in character as of the time of patent, not a reservation of lands ultimately found to be mineral long after record title had passed. Otherwise, the Court stated, "great uncertainty in titles, conflicting claims, and vexatious litigation would be inevitable." 234 U.S. at 684. The patents were to confirm the title of the railroad company by confirming compliance with the terms of the grant (*i.e.*, construction of the road) and identifying the lands passing thereunder, and therefore it was imperative, the Court held, that patents not be issued for lands excluded from the grant and that there be a point in time when the rights of the railroad company were finally determined and fixed of record. See 234 U.S. at 685-92; cf. *Iron Silver Mining Co.*

v. Elgin Mining & Smelting Co., 118 U.S. 196, 207 (1886). The Secretary of the Interior could not, the Court held, avoid this result by inserting an exception in a patent for mineral lands thereafter found in the tracts conveyed, since the Secretary had no authority to reserve what the law had explicitly granted. See 234 U.S. at 696-705. See also *Shaw v. Kellogg, supra,* 170 U.S. at 337-38; *Deffebacke v. Hawke, supra,* 115 U.S. at 406.

Congress too has manifested its concern that the patents issued to railroad grant lands establish an unassailable record, even in situations in which the patents were erroneously issued for lands not properly included within the scope of a railroad grant. In 1891, in order "to make titles resting upon patents dependably secure," *United States v. Whited & Wheless*, 246 U.S. 552, 562 (1918), cf. *United States v. Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922), Congress enacted legislation providing that no attack on a patent by the United States could be made more than six years after its issuance, 43 U.S.C. § 1166, and five years later enacted a six-year statute of limitations specifically for suits by the United States to vacate patents erroneously issued under the railroad grant legislation with the proviso that "no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." 43 U.S.C. § 900. By such legislation, Congress

> recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be conclusive against the Govern-

ment, and this notwithstanding any errors, irregularities, or improper action of its officers therein.

United States v. Winona & St. P.R.R., 165 U.S. 463, 476 (1897); see *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447 (1908); *United States v. Coronado Beach Co.*, 255 U.S. 472, 488 (1921). In other words, the Court said, "the patent would become *conclusive* as a transfer of the title" as against the United States after the limitation period had run, 165 U.S. at 476 (emphasis added), and the titles of bona fide purchasers derived from such patents were to be confirmed in any event, "notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation . . . ." 165 U.S. at 481. See *United States v. Southern P.R.R.*, 184 U.S. 49 (1902).

By this legislation, Congress confirmed decisions of this Court protecting the rights of bona fide purchasers of railroad grant lands. In *United States v. California & Oregon Land Co.*, 148 U.S. 31 (1893), the Court held that the titles of bona fide purchasers of lands granted by Congress to the State of Oregon for construction of a wagon road could not be challenged by the United States even if the certification by the state that the road had been constructed had been fraudulently obtained, where it was not shown that the purchasers knew of any defect in their titles at the time of their purchases; "[i]f a patent from the government be presented," the Court said, "surely a purchaser from the patentee is not derelict . . . because he relies upon the determination made by the land officers of the government in executing the patent, and does not institute a personal inquiry into all the anterior transactions upon which the patent rested." 148 U.S. at 45. See *United States v. Burlington & M.R. R.R.*, 98 U.S. 334, 342 (1878); *United States v. Stinson*, 197 U.S. 200 (1905).[14] Even when there is "satisfactory proof" of fraud in obtaining a patent, once the legal title has passed from the patentee, "bona fide purchaser for value is a perfect defense." *Wright-Blodgett Co. v. United States*, 236 U.S. 397, 403 (1915).

In this case, the decision of the Court of Appeals creates precisely the title uncertainty and potential for litigation condemned by the Court in the railroad grant cases and disapproved by Congress in its patent confirmation legislation. Under the decision below, no grantee of railroad grant lands could ever be certain that the United States would not assert a noncompensable way over his lands for some public purpose, however remote

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[14]The patent confirmation legislation was merely the last in a series of acts passed by Congress to protect the rights of settlers on or bona fide purchasers of railroad grant lands who had no way of ascertaining from the public land records that the lands which they had improved or purchased were not legally available. See 43 U.S.C. §§ 888-902, 905-06.

For example, Congress provided in 1876 for confirmation of and issuance of patents with respect to preemptions and homestead entries made in good faith on small tracts of public lands within the limits of a land grant prior to the time when notice of withdrawal of the lands embraced in the grant was received at the local land office, 43 U.S.C. § 890; see *Northern P.R.R. v. Amacker*, 175 U.S. 564 (1900), and for issuance of patents for all such entries made "in pursuance of the rules and instructions" of the Land Department within the limits of any land grant after expiration of the grant. 43 U.S.C. § 892. In 1887, Congress provided for issuance of patents to persons who had purchased in good faith from the grantee railroad companies lands that had been erroneously certified or patented to the grantees, 43 U.S.C. § 897, and it was held by this Court that persons protected under this legislation included those who relied on the apparent record transfer of title effected by governmental certification of the grant. See *Logan v. Davis*, 233 U.S. 613 (1914); *United States v. Chicago, M. & St. P. Ry.*, 195 U.S. 524 (1904); *United States v. Winona & St. P. R.R.*, 165 U.S. 463 (1897).

from purposes envisioned a century ago and regardless of the present degree of development of the lands. In addition, no prospective purchaser of such lands could ever be sure that he had acquired unencumbered title even after examination of the patents to the lands, the public land rcords and the enabling legislation. There would be, in short, no "date at which, by record, the title of the [successors to] the railroad compan[ies] could be considered as definitely ascertained." *Tarpey v. Madsen, supra,* 178 U.S. at 223.

Accordingly, although it may be entirely appropriate to imply reservations of rights that are *consistent* with and ordinarily incident to express congressional reservations,[15] the decisions of this Court condemn the clouding of unqualified record titles by the implication of government reservations *inconsistent* with the terms of the grants on which they are based. As the Court said in *Burke, supra,*

> 'A patent upon its face should either grant or not grant. It must be seen from a construction of the language of the grant [patent] itself whether any-

[15] For example, water right reservations have sometimes been implied where consistent with and supportive of express federal reservations of land for water dependent purposes. See, *e.g., Winters v. United States,* 207 U.S. 564 (1908); *Arizona v. California,* 373 U.S. 546, 595-601 (1963). In such cases, the implied reservation is based upon and derived from the language and purpose of the express reservation; it is an appurtenance to the express reservation, in no way alters the meaning and effect of clear language of grant or reservation in the operative title documents, and has no impact on titles to lands derived from the United States. See *United States v. State of New Mexico,* 46 U.S.L.W. 5010 (U.S. Sup. Ct. No. 77-510, July 3, 1978). In no such case has a right been implied in favor of the United States that is *inconsistent* with any language of congressional or administrative grant or has an implied reservation been condoned to withhold what is given "either expressly or by necessary or fair implication." *United States v. Denver & R.G. Ry.,* 150 U.S. 1, 14 (1893); see *Russell v. Sebastian,* 233 U.S. 195, 205 (1914).

> thing is granted or not, and, if anything be granted, what it is.'

234 U.S. at 698-99, quoting *Cowell v. Lammers,* 21 F. 200, 208 (C.C.D. Calif. 1884).

C. *Federal Legislation and Decisions of This Court Prohibiting Appropriation of the Public Domain Provide No Support for the Decision Below.*

In its opinion below, the Court of Appeals professes to find recognition of an 1862 reservation in (i) the enactment by Congress of the Unlawful Inclosures Act in 1885, (ii) the decision of this Court in *Camfield v. United States,* 167 U.S. 518 (1897), construing that Act, and (iii) the decision of this Court in *Buford v. Houtz,* 133 U.S. 320 (1890). None of these authorities provides any such support.

Section 3 of the Unlawful Inclosures Act, 43 U.S.C. § 1063, prohibits the prevention or obstruction of free passage over the public lands by "force, threats, intimidation . . . or any other unlawful means." The Tenth Circuit did not hold in this case, and the United States did not contend, that petitioners unlawfully obstructed the public domain; title to petitioners' lands, not use of the public domain, is the sole issue in this case. The court also did not hold, and the United States did not contend, that the Unlawful Inclosures Act retroactively imposed rights of way on petitioners' lands because of their proximity to public lands, although that was the theory under which the United States proceeded in the trial court.[16] See

[16] Those courts that have considered the question have agreed with the District Court in this case that the Unlawful Inclosures Act did not by its terms impose rights of way over privately owned lands.

(Footnote continued next page)

Answer to Complaint, §§ 4, 12, R. 29-30; Defendants' Substituted Proposed Findings of Fact and Conclusions of Law, Conclusion ¶ 3, R. 308. Rather, the court held that the Unlawful Inclosures Act was "evidence of congressional recognition in 1885 that there was . . . an implied reservation in the 1862 railroad grant." Pet. App. xi-xii, xvi.

The language of the Unlawful Inclosures Act, however, shows it to be a remedial statute designed to deal with the limited problem of large-scale fencing of the public domain by cattlemen; it is concerned with unlawful appropriation of the public domain, not the creation or affirmation of rights of access across private lands. "[A]ll its provisions related to public lands — not to private lands." *United States v. Buchanan,* 232 U.S. 72, 75 (1914); see *Homer v. United States,* 185 F. 741, 747 (8th Cir. 1911) (Van Devanter, J., dissenting). It "was designed to prevent the illegal fencing of public lands," *Omaechevarria v. State of Idaho,* 246 U.S. 343, 349-50 (1918), "to sanction free passage over the public lands and to make the obstruction thereof by *unlawful* means

See *United States v. Rindge,* 208 F. 611, 622-23 (S.D. Calif. 1913); *United States v. Douglas-Willan Sartoris Co.,* 3 Wyo. 287, 300, 22 P. 92, 97 (1889). Of course, to the extent that the Act were applied to impose encumbrances on lands granted prior to its effective date, it would be unconstitutional. See *United States v. Dickinson,* 331 U.S. 745, 748 (1947); *United States v. Causby,* 328 U.S. 256, 261-62 (1946). Since the grants to the Union Pacific took effect as of the date of the Union Pacific Act once the lands granted were identified by reason of location of the route and vested by completion of the road, see *St. Paul & P.R.R. v. Northern P.R.R.,* 139 U.S. 1, 6 (1891), *Wisconsin C.R.R. v. Price County,* 133 U.S. 496, 509 (1890), Congress could not by subsequent legislation impair the titles so vested; the United States

> cannot legislate back to themselves, without making compensation, the lands they have given [the Union Pacific Railroad Company] to aid in the construction of its railroad . . . . No change can be made in the title created by the grant of the lands . . . without the consent of the corporation.

Union P.R.R. v. United States, 99 U.S. 700, 719 (1878).

a punishable offense." *McKelvey v. United States,* 260 U.S. 353, 359 (1922) (emphasis added).

Section 1 of the Unlawful Inclosures Act makes unlawful all enclosures of the public lands "made, erected, or constructed," as well as the assertion of a right to the exclusive use and occupancy of the public lands, by any person without color of title to the lands enclosed or appropriated. 43 U.S.C. § 1061. Section 2 of the Act requires the United States Attorney, on request of any citizen, to institute a civil suit in federal court to restrain violations of the Act; if the "inclosure" is found to be unlawful in such proceedings, the court is to order its summary destruction. 43 U.S.C. § 1062. Section 3 of the Act, quoted above, prohibits the obstruction of free passage over the public lands. 43 U.S.C. § 1063. Section 4 provides criminal penalties for any person violating any provision of the Act. 43 U.S.C. § 1064. Section 5 authorizes the President to take any necesary measures to "remove and destroy any unlawful inclosure of any of the public lands," and Section 6 requires consent of the Secretary of the Interior to any suit under the Act involving alleged inclosures of no more than 160 acres. 43 U.S.C. §§ 1065, 1066.

The history of the Unlawful Inclosures Act confirms the purpose of the Act, reflected in its language, to secure summary abatement of, and to impose criminal penalties for, unlawful occupation of and obstruction of free passage over the public lands of the United States. It "was passed in view of a practice which had become common in the Western Territories of enclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, without shadow of title to

such lands, and surrounding them by barbed wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence." *Cameron v. United States*, 148 U.S. 301, 305 (1893); see Gates at 466-68, 473-74.[17] There is not

[17]Following the invention of barbed wire in the 1870's, cattlemen began to fence large portions of the public domain to keep both settlers and other stockmen out of their accustomed grazing grounds. See *Golconda Cattle Co. v. United States*, 201 F. 281, 284-85 (9th Cir. 1912), *rev'd on reh.*, 214 F. 903 (9th Cir. 1914); *Healy v. Smith*, 14 Wyo. 263, 281-84, 83 P. 583, 586-87 (1906); Gates at 466-67. In his report for the year 1882, the Secretary of the Interior noted that the "illegal inclosure of the public lands in certain States and Territories, and the exclusive occupation of large tracts by private parties to the deprivation of the rights of others and the impediment of settlement and intercourse, have become matters of serious complaint." 1 *Report of the Secretary of the Interior for the Fiscal Year Ending June 30, 1882*, at 13 (1882). Noting that existing laws only authorized the President to direct United States marshals to remove unlawful boundaries placed on public lands and to remove persons unlawfully in possession thereof, the Secretary recommended enactment of a statute "imposing penalties for the unlawful inclosure of the public lands, for and preventing by force or intimidation legal settlement and entry." *Id.* at 13-14 (emphasis added). See also 1 *Report of the Secretary of the Interior for the Fiscal Year Ending June 30, 1883*, at xxxii (1883); 1 *Report of the Secretary of the Interior for the Fiscal Year Ending June 30, 1884*, at xvii (1884).

On April 23, 1884, the Committee on the Public Lands of the House of Representatives reported favorably H.R. 5479, which ultimately became the Unlawful Inclosures Act. See H.R. Rep. No. 1325, 48th Cong., 1st Sess. (1884). The report referred to the vast correspondence amassed by the Land Office on the matter of illegal fencing and included communications from the Commissioner and Acting Commissioner of the Land Office describing why existing laws were inadequate: Much of the land involved was unsurveyed, and insufficient funds and personnel were available to compile accurate descriptions of unlawfully enclosed lands necessary to bring suits in equity; there were no laws under which illegal fencers could be prosecuted criminally; and the ordinary procedures for referring civil suits to the Department of Justice, having such suits investigated, filing suit and awaiting the culmination of slow judical proceedings all tended to render the Land Office virtually powerless to remedy the situation. *Id.* at 4-5; see Sen. Ex. Doc. No. 61, 47th Cong., 2d Sess. (1883); Sen. Ex. Doc. No. 127, 48th Cong., 1st Sess. (1884); Gates at 467. The bill reported by the Committee was aimed at remedying these deficiencies in existing law. "This bill," the Committee stated, "declares these inclosures unlawful; allows the citizen to abate them as public nuisances, a right the

(Footnote continued next page)

a hint in the congressional debates on the bill of any intention that the bill permit the United States or any person to acquire any right in privately owned lands or that it provide legislative recognition of the existence of any federal right of way over any lands previously granted by the United States; the focus was exclusively on removal of unlawful physical obstructions and punishment of acts of intimidation and violence that effected exclusive occupancy of the public lands.[18]

common law of England gives, and which has been exercised time out of mind. It puts the whole machinery of the law and the power of the Government at the command of any citizen and without awaiting the circumlocution of executive action." H.R. Rep. No. 1325, *supra*, at 7.

[18]See generally Cong. Record, 48th Cong., 1st Sess. 4769-82 (June 3, 1884). In the House, the sponsor of the bill, Representative Payson, stated the following to be the "fact in regard to the evil which this bill is intended to reach":

> . . . [M]illions of acres of the public lands are held and fenced in by people who have no shadow of claim to an acre of them.
>
> • • •
>
> . . . [M]illions of acres of the public lands are fenced in with barbed-wire fences [and] American citizens when desiring to pre-empt or make homestead claims upon this land are run off with shotguns and rifles. It is to open this land up to sale and settlement that this bill is introduced. . . . [T]he evil which is sought to be cured is that which prevents an American citizen from making a settlement upon the public lands, which he is prevented from doing for the reason that they are fenced in by foreigners . . . .

Cong. Record, 48th Cong., 1st Sess. 4769 (June 3, 1884). Representative Henly noted that it was "these wire fences, which constitute the great evil this bill is addressed to . . . ." *Id.* Representative Rogers at one point declared that the "object of this bill is simply to break down and destroy fences which have been unlawfully or without authority of law established upon the public domain"; the Speaker of the House commented that the "chair so understands the bill." *Id.* at 4770; see also id. at 4771, 4772 (remarks of Representatives Rogers and Oates and of Speaker of the House).

After it was passed by the House, the bill went to the Senate Committee on Public Lands, which reported it favorably on January 12, 1885 with the following comments:

> The necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent. Without the least authority, and in open and bold defiance of the rights of the Government, large, and oftentimes

(Footnote continued next page)

Both the United States and this Court have in fact recognized that the Act effects no modification of the ordinary law of titles, even with respect to the odd-numbered sections within a checkerboard grant. In 1887, two years after the statute was enacted, the Secretary of the Interior requested legislation that would provide for construction of roads over privately owned checkerboard lands for access to the interlocked public lands, and recognized that any such legislation would have to provide for payment of compensation to affected property owners to satisfy constitutional requirements. See p. 15, *supra*. In *Camfield v. United States*, 167 U.S. 518, 527-28 (1897), the Court held that the owner of the odd-numbered checkerboard sections would "doubtless" have the right to fence in each section separately, because "[s]o long as the individual proprietor confines his enclosure to his own land, the Government has no right to complain, since he is entitled to the *complete and exclusive enjoyment of it, regardless of any detriment to his neighbor*"; it was only when, the Court held, "under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute,

foreign corporations deliberately inclose by fences areas of hundreds of thousands of acres, closing the avenues of travel and preventing the occupancy by those seeking homes. While those fencing allege the lands within such inclosures are open to settlement, yet no humble settler, with scarcely the means for the necessaries of life, would presume to enter any such inclosure to seek a home.

. . . [T]hose appropriating vast areas are hoping the only remedy to be used against them will be the law's delay in the courts.

Therefore your committee have added a new section to the Army bill, authorizing the President of the United States to summarily remove all obstructions, and, if necessary, to use the military power of the United States.

S. Rep. No. 979, 48th Cong., 2d Sess. 1 (1885). As modified by the Senate, the bill was quickly passed and became law on February 23, 1885. 23 Stat. 321.

and is guilty of an unwarrantable appropriation of that which belongs to the public at large." (Emphasis added.)[19]

There simply is no support in the language or history of the Unlawful Inclosures Act for the conclusion of the court below that the Act recognized pre-existing federal rights of way over petitioners' lands, or any basis for the conclusion of the Court of Appeals that the decisions in *Camfield v. United States, supra,* and *Buford v. Houtz,* 133 U.S. 320 (1890), constituted judicial recognition of such rights. Both cases involved actions by owners of checkerboard land intended to effec' appropriation of public lands; neither decision qualifies the language of grant in the Union Pacific Act or provides any basis for implying rights of way for new public uses across patented lands.

In *Camfield,* the United States brought an action under Section 2 of the Unlawful Inclosures Act, 43 U.S.C. § 1062, to compel the removal of fences erected on privately owned checkerboard lands that were constructed in such a manner as to enclose about 20,000 acres of public lands in two townships. The fences were constructed at the section lines on the odd-numbered sections owned by defendants along the borders of the townships in such manner as to enclose the townships in their entirety and

[19]The Ccurt added that it thought this "scarcely a practical question," since separate enclosure of each section would only become desirable "when the country had been settled, and roads had been built which would give access to each section." 167 U.S. at 528. Thus, 35 years after the grant to the Union Pacific, the Court thought that access to the retained lands was not yet a practical problem, in light cf the vastness of the West and the scarcity of its populatcn. In such circumstances, it is difficult to comprehend how a Congress sitting in 1862 could have been concerned about the question, let alone to have made it the "dominant intent" cf the railroad grant legislation as the Tenth Circuit and respondent would have it.

thereby appropriate the even-numbered public sections therein.[20] By analogizing to state police power permitting the prevention of activity on private property that was offensive or injurious to neighboring property owners, the Court held that the United States, as a landowner, could abate the nuisance created by defendants on their lands which had the purpose and effect of appropriating to exclusive use the property of the United States. 167 U.S. at 522-25. Cf. *United States v. Alford,* 274 U.S. 264, 276 (1927). But in allowing police power type of protection on public lands, the Court in *Camfield* was careful to make clear that it was not recognizing the existence of any public property rights in private lands. See pp. 36-37, *supra.*

In *Buford,* the Court held that owners of unfenced checkerboard land in Utah had properly been denied an injunction against the large-scale trailing and grazing of sheep across their lands, on the ground that the Court would not assist the plaintiff-cattlemen in monopolizing the public domain by in effect ordering defendants to cease using the public lands if they could not keep their flocks from grazing on plaintiffs' lands. *Buford* was, in reality, only a fencing case, concerned solely with the issue whether the owner of unfenced land contiguous to public grazing land could limit grazing on the public lands because of the propensity of the animals to cross and graze on the private land. It did not determine that a public right of passage existed across the private land and did not limit the right of the private landowner to fence his land and exclude public grazing thereon or the crossing thereof. The Court in fact noted that Utah,

[20]A diagram of defendants' fencing is included in the Court's opinion in *Camfield* at 167 U.S. at 520.

in common with other states, had adopted a "fence law" which required a landowner to fence his land in order to keep out livestock grazing at large and that a decision for plaintiffs would in effect have amounted to an adoption by judicial fiat of the common law rule that required the owner of livestock to keep his animals confined. Had the Court in *Buford* meant anything more by its decision, it could have, and certainly would have, disposed of the entire controversy by holding directly that the public had a right of way for moving animals across the private land; that it did not is a clear acknowledgement of its respect for the unfettered quality of the private grant.[21] Indeed, in *Lazarus v. Phelps,* 152 U.S. 81 (1894), the Court subsequently held that state fence laws did *not* authorize livestock owners deliberately to use or take possession of unfenced privately owned lands without making compensation to the owners of such lands. See *Light v. United States,* 220 U.S. 523, 537 (1911); *Cosgriff v. Miller* 10 Wyo. 190, 222-24, 68 P. 206, 211-12 (1902).

Accordingly, legislation and decisions proscribing unlawful appropriation of the public domain are wholly irrelevant to any issue in this case. Petitioners have not violated the Unlawful Inclosures Act by the mere ownership of their lands, and they have not fenced the public domain. Pet. App. ii. If petitioners obstruct free passage over the public lands, the United States should pursue the civil and criminal remedies provided by the Act, not seize private lands for public use without just compensation.

[21]As in *Camfield*, by approving the Utah fence legislation, the Court in effect recognized that a landowner could fence or otherwise make legitimate use of his own land even to the detriment of those seeking to utilize the public domain.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the judgment of the Court of Appeals be reversed and that the judgment of the District Court quieting petitioners' titles against the United States be affirmed.

Respectfully submitted,
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No. 77-1686

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEO SHEEP COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. vi to xxvii) are reported at 570 F.2d 881. The district court's findings of fact and conclusions of law (Pet. App. i to v) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1977, and a petition for rehearing was denied on February 28, 1978. The petition for a writ

of certiorari was filed on May 26, 1978, and was granted on October 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States reserved a right of access to the retained even-numbered sections of land when it granted the Union Pacific Railroad title to the odd-numbered sections completely surrounding the even-numbered sections.

STATUTES INVOLVED

Sections 3 and 4 of the Act of July 1, 1862, ch. 120, 12 Stat. 492; Section 4 of the Act of July 2, 1864, ch. 216, 13 Stat. 358; and the Unlawful Inclosures of Public Lands Act of 1885, ch. 149, 23 Stat. 321, as amended, 43 U.S.C. 1061-1066, are reprinted at Pet. App. xxviii to xxxii.

STATEMENT

Petitioners are the owners of certain odd-numbered sections of land in Carbon County, Wyoming, which were originally granted by Congress to the Union Pacific Railroad pursuant to the Act of July 1, 1862 (the Union Pacific Act), ch. 120, 12 Stat. 492, as amended by the Act of July 2, 1864, ch. 216, 13 Stat. 358 (Pet. App. ii). Petitioners' sections alternate in checkerboard fashion with the even-numbered sections of land that were retained in the public domain

(*ibid.*).[1] Petitioners also use the even-numbered publicly owned sections for grazing and pasture, pursuant to permits issued under Section 3 of the Taylor Grazing Act, ch. 865, 48 Stat. 1270, as amended, 43 U.S.C. 315b (Pet. App. ii). No fences separate petitioners' sections from the sections that are public domain (*ibid.*).

In 1938, the Bureau of Reclamation built the Seminoe Reservoir on public lands to the west and south of petitioners' lands, and the reservoir and adjacent public lands have been used by the public for hunting and fishing for many years (Pet. App. vii). In recent years, however, the government began to receive complaints that the public was being denied access to the reservoir area or being required to pay for such access (*ibid.*) Because of the checkerboard pattern of private and public land holdings, it is impossible to reach the reservoir from this direction without crossing some corner of privately owned land (see the map at Pet. App. xviii).

The Department of the Interior attempted to negotiate with the private landowners to secure public access to the reservoir (Pet. App. vii to viii). When these negotiations failed, the Department decided to improve and partially relocate an existing dirt road in order to provide public access to the reservoir from a nearby public highway (Pet. App. viii). In late 1973, the Bureau of Land Management began to clear the vegetation in order to mark out this dirt road.

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[1] A plat of the area is attached to the opinion of the court of appeals (Pet. App. xviii).

The road was located to run wholly within the even-numbered sections of public domain, except at two points where it crossed the corners of petitioners' sections as they joined the interlocking public sections (Pet. App. viii to ix, xviii).

Petitioners then brought this action against the United States and several of its officers for declaratory and injunctive relief under the Quiet Title Act, 28 U.S.C. 2409a, contending that the United States had unlawfully entered their property by clearing a pathway across their land at the section corners (Pet. App. vi).[2] The United States in response acknowledged clearing the path and claimed it had the legal right to do so (*ibid.*). Both sides stipulated the facts and moved for summary judgment (Pet. App. vi to vii).

The district court granted summary judgment for petitioners, holding that the United States had not reserved or obtained any easement or other right to cross petitioners' lands for access to its own lands or the reservoir (Pet. App. iv to v).

The court of appeals reversed, with one judge dissenting (Pet. App. vi to xx). It held that the 1862 congressional grant of the odd-numbered sections to petitioners' predecessor in interest, the railroad, was subject to the implied reservation of an easement "to

[2] Petitioners also challenged the determination by the Department of the Interior not to prepare an environmental impact statement for the road project (see Pet. App. iii to v). Neither the district court nor the court of appeals reached the question whether the National Environmental Policy Act required such a statement, and the question is not before this Court.

permit access to the even-numbered sections which were surrounded by lands granted the railroad" (Pet. App. xi). The Court reasoned that if Congress had not reserved a right of access, "then the grant of the odd-numbered sections rendered inaccessible the interlocking even-numbered sections," a result that would have thwarted the congressional purpose of encouraging settlement near the railroad (*ibid.*). The consequence would be that "Congress not only granted the railroad the odd-numbered sections, but also granted the railroad the exclusive use of the even-numbered sections" (*ibid.*). The Court was "unable to conclude that such was the intent of Congress" (*ibid.*). The court found support for its conclusion in several decisions of this Court and other courts and in congressional enactment of the Unlawful Inclosures of Public Lands Act of 1885, ch. 149, 23 Stat. 321, as amended, 43 U.S.C. 1061-1066 (Pet. App. xi to xvi).

In a brief supplemental opinion denying rehearing, the court rejected petitioners' contentions that the issue of an implied reservation had not been properly raised and that it presented a question of fact on which the trial court should conduct an evidentiary hearing (Pet. App. xxvi to xxvii).

INTRODUCTION AND SUMMARY OF ARGUMENT

It has been estimated that in the era of the railroad grants Congress granted more than 131 million acres of public lands either directly to the various railroads or to the states for disposition to the railroads. P. Gates, *History of Public Land Law Development* 379,

384-385 (1968). Virtually all of the railroad grants, like those in this case to the Union Pacific, were made in a checkerboard pattern. The odd-numbered sections were granted to the railroads, and the even-numbered sections were retain l as part of the public domain. Because of the interlocking pattern, the retained public sections were surrounded on all sides by granted sections.[3] Consequently, it was not possible to enter or leave the public sections without passing over some portion of a section granted to a railroad.[4] The even-numbered sections that Congress retained amounted to more than one hundred million acres.[5]

No right of way over the granted lands for access to the retained lands was reserved expressly in the Union Pacific Act—or, to our knowledge, in any of the other railroad grant enactments. Petitioners rely

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[3] The checkerboard pattern was not always complete, since in some cases the lands adjacent to the right of way were not available, and other lands farther from the new rail line were selected in their place. But the checkerboard pattern, as exemplified in this case, was the general rule.

[4] It was also true, of course, that the granted sections were surrounded by retained sections. But the owners of the granted sections could readily obtain access to them across the retained sections by virtue of the federal policy permitting the construction of roads and highways across the public lands. See note 7, *infra*.

[5] The number of even-numbered sections retained in the public domain was less than the number of odd-numbered sections granted because, for one thing, in most cases either section 16 or section 36 of each township was reserved for public schools. See P. Gates, *History of Public Land Law Development, supra*, at 358.

on the silence of Congress as establishing that it did not intend to reserve any right of access. Since this conclusion requires, in the words of the court of appeals, ascribing to Congress an unwarranted "degree of carelessness or lack of foresight" (Pet. App. xi), petitioners explain that Congress "no doubt assum[ed] that any access impediment that did in fact occur could have easily been remedied by exercise of the sovereign power of eminent domain" (Br. 18).

We submit that it is virtually inconceivable that Congress intended to give up the government's right of access to the retained sections, and no less inconceivable that Congress intended to require the institution of thousands of eminent domain proceedings before government agents or government grantees could enter any of the one hundred million acres of checkerboard public lands without trespassing on railroad lands. Such a contention is so unreasonable that it should not be adopted unless compelled by the clearest evidence of legislative intent.

There is no such evidence. Petitioners argue that the record is silent, but in fact it demonstrates that Congress's plan for the development of the retained public lands required a reserved right of way. Congress intended to recoup the value of the lands granted to the railroads from the enhanced value of the retained public sections resulting from the development of the rail lines. These retained sections were to be sold for double the minimum price usually charged for public lands. This plan depended on access to the public sections, and it is irreconcilable

with petitioners' contention that Congress did not intend to reserve a right of access.

In these circumstances, the court of appeals correctly concluded that such a right of way was impliedly reserved because the intent to do so was manifest in the pattern of the grants. In private conveyances, the grantor's intent to reserve a right of access is presumed when he conveys lands completely surrounding property that he retains. The same principle applies to congressional grants.

Although there has been little litigation on the question, the clear majority of decisions are in accord with the decision of the court of appeals here. And this Court's decision in *Camfield* v. *United States*, 167 U.S. 518 (1897), rejects petitioners' contention that the silence of Congress established its intention to allow the grantees of the railroad sections to control the access into the retained public sections. The administrative interpretations of the Act are likewise consistent with our view.

Recognition of this reserved right of access will not throw into question title to the lands granted to the railroads, nor place any undue burden on the railroads or their grantees. The government claims only the limited right of access that was implicit in the plan of the checkerboard grants. The access way must be located so as to minimize the burden on the railroad grant lands. The right is limited by the principles of minimum intrusiveness that are well established in the context of common law easements

of necessity. And once the area is developed and other means of access made available, the implied right of access is no longer enforceable since it is no longer necessary.

ARGUMENT

I. CONGRESS IMPLICITLY RESERVED A RIGHT OF ACCESS WHEN IT GRANTED TO THE RAILROADS THE ODD-NUMBERED SECTIONS SURROUNDING THE RETAINED SECTIONS OF THE PUBLIC DOMAIN

A. Under Settled Rules Of Property Law, The Intent To Reserve A Right Of Access Was Implicit In The Grant Of Lands Completely Surrounding The Retained Sections

It is well settled that if a private landowner conveys to another a portion of his lands, retaining other lands completely surrounded by the granted lands, he is presumed to have reserved a right of access over the granted lands for ingress to, and egress from, his landlocked property. 3 R. Powell, *The Law of Real Property* ¶ 4.10, at 430-432 (rev. ed. 1977); 2 G. Thompson, *Commentaries on the Law of Real Property* § 362, at 410-424 (1961 ed.); *Restatement of the Law of Property*, §§ 474-476 (1944).[6] Such rights of way, also called easements by necessity, have been uniformly recognized despite the general rule in construing private conveyances that

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[6] See, *e.g.*, *Harris* v. *Gray*, 28 Tenn. App. 231, 188 S.W.2d 933 (1945); *Hoffman* v. *Shoemaker*, 69 W.Va. 233, 71 S.E. 198 (1911); *Jay* v. *Michael*, 92 Md. 198, 48 A. 61 (1900); *Meredith* v. *Frank*, 56 Ohio St. 479, 47 N.E. 656 (1897).

doubts are resolved in favor of the grantee and against the grantor, who is not permitted to derogate from the terms of the grant. See 3 R. Powell, *supra*, ¶ 4.10, at 431; *Restatement of the Law of Property*, *supra*, at § 476 Comment c.

Since the implicit intent to reserve a right of access to retained lands is recognized in private conveyancing, a fortiori the same intent must be recognized in the case of the congressional railroad grants. For "[i]t has long been established that, when grants to federal land are at issue, any doubts 'are resolved for the Government, not against it.'" *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978), quoting *United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 116 (1957). We do not contend that an easement of necessity was created here without regard to Congress's intent. The legislative grant of public lands is a statute as well as a conveyance, and must be construed to carry out Congress's intent. *Missouri, Kansas, and Texas Ry.* v. *Kansas Pacific Ry.*, 97 U.S. 491, 497 (1878); *Schulenberg* v. *Harriman*, 88 U.S. (21 Wall.) 44, 62 (1874). But the foundation of the common law rule of easements by necessity—the recognition that, in the absence of inescapable evidence to the contrary, a grantor necessarily intends to reserve a right of way where that is essential for access to his remaining property—is equally applicable to congressional grants. Under this settled rule of property law, Congress's intent to reserve a right of access to the landlocked public sections was manifest in its act of granting the surrounding sections of land to the railroads.[7]

[7] Petitioners argue (Br. 10 n.5) that if an easement of necessity "were to be implied in favor of the sovereign, it would have to be reciprocally implied in favor of every grantee from the sovereign and his successors with respect to the surrounding public lands." As petitioners note (*ibid.*), several state courts have refused to imply easements of necessity in favor of grantees from the sovereign. See, *e.g.*, *Guess* v. *Azar*, 57 So.2d 443, 445 (Fla. 1952); *Pearne* v. *Coal Creek M. & M. Co.*, 90 Tenn. 619, 627-628, 18 S.W. 402, 404 (1891). As the court explained in *Guess* v. *Azar* (57 So.2d at 444-445):

> In Jones on Easements, page 247, we find the reason for the rule that where the state is the common source of title the right to a way of necessity does not arise. It is said there that "By public statutes she provides for the establishment and maintenance of public roads, penetrating every neighborhood and sufficiently numerous to meet the general wants of her citizens. * * * It would be ruinous to establish the precedent contended for, since by it every grantee from the earliest history of the State, and those who succeed to his title, would have an implied right of way over all surrounding and adjacent lands held under junior grants, even to the utmost limits of the State."

No issue is presented in the present case regarding any asserted rights of the railroads and their grantees to cross the retained government lands; indeed, petitioners have the use of the adjoining public sections pursuant to Taylor Grazing Act permits. We note, however, that it was not necessary for Congress to grant the railroads a right of way across the retained public sections. The owners of the odd-numbered sections were able to develop them without impediment because of the federal policy, well established prior to the passage of the railroad grant acts, permitting the construction of roads and highways across the public lands. Section 8 of the Act of July 26, 1866, ch. 263, 14 Stat. 253, which provided that "[t]he right of way for the construction of high-

B. The Alternative Suggestion That Congress Intended To Exercise The Power Of Eminent Domain To Regain The Right Of Access To The Retained Public Lands Is Unreasonable And Unworkable

In arguing that Congress's silence establishes its failure to reserve a right of access to the retained public sections, petitioners rely on the claim that Congress "no doubt assum[ed] that any access impediment that did in fact occur could have easily been remedied by exercise of the sovereign power of eminent domain" (Br. 18). As petitioners construe the railroad grant acts, then, before any officer, agent, grantee, or licensee of the federal government could enter on the more than one hundred million acres of retained public lands without trepassing on some portion of the lands granted to the railroads, it was necessary for the federal government to exercise the power of eminent domain. On this theory, thousands upon thousands of separate eminent domain actions were a prerequisite to development of the public sec-

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ways over public lands, not reserved for public uses, is hereby granted," was "a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government." *Central Pacific Ry. Co.* v. *Alameda County*, 284 U.S. 463, 473 (1932); M. Clawson and B. Held, *The Federal Lands* 50 (1957). (Section 8 was repealed by Section 706 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2793, and the acquisition of rights of way across public lands is now governed by Title V of that Act, 43 U.S.C. 1761 *et seq.*) Accordingly, we do not agree with amicus Energy Transportations Systems Inc. (Br. 28-33), which urges that easements in favor of the railroad grantees should be recognized.

tions—or, indeed, to entrance to or exit from those sections.

It is inconceivable that Congress intended to overwhelm the federal government and the state, federal, and territorial courts with that volume of eminent domain proceedings.[8] Such an unreasonable and unworkable construction of the public land laws should not be adopted unless the legislative history compels it.

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[8] The authority of the United States to bring eminent domain proceedings in the federal courts, or in state courts without the state's consent, was not settled at the time of the Union Pacific grants. Although it was generally conceded that the United States could bring eminent domain proceedings in state courts with the consent of the state, it was argued that the United States, a government of limited delegated powers, lacked the authority to institute eminent domain proceedings without state consent, since no power of eminent domain was expressly granted in the Constitution. 1 *Nichols on Eminent Domain* ¶ 1.24 (3d ed. 1976). The federal power of eminent domain was clearly established by this Court's decision in *Kohl* v. *United States*, 91 U.S. 367 (1875).

One of the chief reasons for the passage of the Unlawful Inclosures of Public Lands Act of 1885, ch. 149, 23 Stat. 321, as amended, 43 U.S.C. 1061 *et seq.*, which authorized private actions to abate unlawful enclosures preventing passage over the public lands, was the lack of government personnel and funds to compile legal descriptions of the enclosed lands and to bring actions to abate the obstruction. H.R. Rep. No. 1325, 48th Cong., 1st Sess. 4-5 (1884). Governments suits to condemn rights of way into each of the retained public sections would have been equally infeasible.

C. The Legislative History Provides No Support For The View That Congress Intended To Require The Widespread Exercise Of The Power Of Eminent Domain Before There Could Be Settlement Or Development Of The Millions Of Acres Of Retained Lands. Rather, The Legislative History Demonstrates That Congress's Plan For The Development Of The Retained Public Lands Required A Reserved Right Of Way

There is no legislative history supporting petitioners' argument that Congress intended to use the power of eminent domain to regain access to the millions of acres of retained public sections in the checkerboard. Indeed, petitioners urge only that the legislative history is silent—that "there was no discussion of the access question in any congressional debate or report" (Br. 18).[9] What the legislative

[9] There is no substance to the suggestion of amici Union Pacific Land Resources Corporation, et al. (Br. 11-12) that amendments to reserve a right of access to the retained public lands were proposed and defeated during the consideration of both the Union Pacific Act and its 1859 precursor. In considering the Union Pacific Act, Congress rejected a proposal to reserve from the lands granted to the railroads not only mineral lands (as was done in the Act), but also any minerals later found on granted lands and a public right to enter the railroad lands to work claims to those minerals. Cong. Globe, 37th Cong., 2d Sess. 1909-1910 (1862). Nothing was said, either favorably or unfavorably, about a general right of access.

In the portion of the 1859 debates cited by amici (Br. 12 n.12), Senator Simmons objected to the necessity of allowing railroad corporations to condemn private land where the right of way went through settled areas, and he concluded (Cong. Globe, 35th Cong., 2d Sess. 579 (1859)):

> [A]lthough I have always voted for these improvements, I have always regretted the necessity of having to let these private enterprises trample upon the rights of the owners of property. I would not permit any Government in the world to invade the rights of the people within the Territories of the United States, but the Government of the United States. We ought to take care of their rights. Here is a range on this route of some fourteen hundred miles through the Territories of the United States, several hundred of which are thickly settled, and we propose to let the dogs loose and tie the stones down; to let these people go in and take their property without any provision for their security. This Government ought to take care of them, and ought to be liberal with them, and if this proposition prevails, I hope that from this time onward there will be a reservation in every grant of land that we shall have a right to go through it, and take it at proper prices to be paid hereafter. Under the original bill, however, if the contract proposed to be made, shall be entered into, you cannot alter it. It presents to my mind a very dangerous experiment. If, however, the Government undertake to do this work and do it wisely, they can do justice by every man who owns a foot of land on the whole route, and we ought to guard it properly.

Although the exact nature of Senator Simmons' proposal (which apparently received no further discussion) is not clear, it does not deal with the reservation of a right of access across the lands granted to the railroads to reach the retained public lands.

history does reveal is that an important purpose of the congressional grants to the railroads was to enhance the value of the retained public lands. Since the accessibility of these lands was a prerequisite to their settlement, Congress's plan required a reserved right of way across the railroad lands.

As this Court has previously recognized, the primary purpose of the grants to the Union Pacific "was to obtain the construction of the railroad by the cor-

poration created to undertake the work." *Platt* v. *Union Pacific R.R. Co.*, 99 U.S. 48, 60 (1878). At the time of the 1862 grant, the Civil War was in progress, and there was concern that the federal government might be cut off from its western possessions. The construction of a transcontinental railroad was intended to "bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies." *United States* v. *Union Pacific R.R. Co.*, 91 U.S. 72, 80 (1875). But in addition to the military need for the railroad, "there were other reasons active at the time in producing an opinion for its completion" (*ibid.*):

> There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of the supplies for the army and the Indians.

Despite the potential benefits of rail lines through the West, efforts to gain support in Congress for large-scale land grants for this purpose were for a long time unsuccessful. Many early bills to grant

lands to railroads were defeated; Congress objected not only to granting away large portions of the public domain, but to doing so in aid of "internal improvements," a controversial constitutional issue of the day. J. Sanborn, *Railroad Land Grants, XII Transactions of the Wisconsin Academy of Sciences, Arts, and Letters* 306-309 (1898). Cf. *United States* v. *Union Pacific R.R. Co., supra,* 91 U.S. at 80.[10] These objections were ultimately overcome by the argument, first advanced by Stephen Douglas in connection with a bill to grant lands to the Illinois Central Railroad, that by retaining one half the lands along the new rail lines for sale after the completion of the line, the United States as landowner could reap the benefits of the economic growth and development promoted by the railroads. Cong. Globe, 31st Cong., 1st Sess. 845 (1850). The Illinois Central grant, ch. 61, 9 Stat. 466 (1850), which became the model for all succeed-

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[10] It was argued that the power to construct internal improvements, other than post roads, was not among Congress's enumerated powers and had been left to the states. On this constitutional theory, in 1830 President Jackson vetoed a bill authorizing the construction of a road to Maysville. His veto message of May 27, 1830, reproduced in 2 J. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897* 483-493 (1896), discusses the views of previous administrations on this question. The fifth edition of Story's constitutional treatise describes the question of the power of Congress to authorize internal improvements as one "which has for a long time agitated the public councils of the nation," and concludes that "[i]n the present state of the controversy * * * the reader must decide for himself upon his own views of the subject." 2 J. Story, *Commentaries on the Constitution of the United States* 166, 169 (5th ed. 1891).

ing railroad grant legislation, reserved every other section within six miles of the rail line and provided that these sections should be sold for no less than double the minimum price normally charged for public lands.

One scholar has described the theory of the provisions for the sale of the retained sections at double the minimum prices as follows (J. Sanborn, *supra*, at 309):

> These provisions were largely a result of the political theories of the time regarding internal improvements and the public lands. The words "internal improvements" had been sufficient to frighten any politician since Jackson's veto of the Maysville road bill in 1830. Then the great value of the public domain, "the heritage of the people," had long been impressed on Congressmen. It was manifestly impossible to grant the public lands to aid the construction of a railroad. To obviate this difficulty, to enable the United States to both eat and keep its cake, the "land owner" theory of the grants was evolved. This theory was as follows: The United States, a great land owner, has large tracts of unsalable land. Acting as a prudent land owner it will donate half of these lands to a railroad, the construction of which will render the remaining half salable, and, by doubling the price of the remaining lands, will lose nothing by the transaction.[1] This was not internal improvements—even the logical Calhoun could find no hint of such a thing in the plan.[2]

[1] "The Federal Government is a great landholder; it possesses an extensive public domain . . . We may bestow them [the public lands] for school purposes, or we may bestow a portion of them for the purpose of improving the value of the rest." Lewis Cass, *Globe*, 1st Sess., 30th Cong., App., p. 536.

[2] "I do not think that there is a principle more perfectly clear from doubt than this one is. It does not belong to the category of internal improvements at all." Ibid., App., p. 537.

Congress thus sought to promote the transcontinental rail lines, both for military purposes and to foster the settlement of the West, and then to recoup the cost of the grants to the railroads by selling the retained lands at double the minimum price. This plan was necessarily premised on the understanding that those lands were accessible for prompt entry and settlement. Petitioners' contention that Congress provided no means for lawful entry onto any of these lands—unless and until the power of eminent domain had been exercised, section by section—is incompatible with the congressional scheme."[11]

[11] By reasoning similar to that which requires a reserved right of access here, this Court has long recognized that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water than unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). "Where water is necessary to fulfill the very purposes for which a federal reservation is created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water." *United States* v. *New Mexico*, No. 77-510 (July 3, 1978), slip op. 6. Under the

II. RECOGNITION OF A RESERVED RIGHT OF ACCESS IS CONSISTENT WITH THE PRIOR CASES AND WITH THE ADMINISTRATIVE PRACTICE AND CONSTRUCTION OF THE RAILROAD GRANT ACTS

A. Most Of The Applicable Cases Have Recognized That Congress Impliedly Reserved A Right Of Access In Making The Railroad Grants

Although the issue has provoked relatively little litigation, the clear majority of the decided cases are in accord with the decision of the court of appeals here. A number of courts have recognized that in granting the odd-numbered sections surrounding the retained public sections in the checkerboard pattern, Congress manifested an implicit intent to reserve a right of access to the retained public lands. *Jastro* v. *Francis*, 24 N.M. 127, 172 P. 1139 (1918); *Herrin* v.

Union Pacific Act, as soon as the exact location of the railroad's route had been determined, it was filed with the Secretary of the Interior, who was then required to withdraw the land within 25 miles on either side of the right of way from preemption, private entry, and sale, so that the railroad could select its grant lands from those available. 12 Stat. 493, as amended, 13 Stat. 358. The withdrawal included the even-numbered sections that would be retained in the public domain. See *ibid.* As under the doctrine of reserved water rights, it is reasonable to conclude that when the federal government retained the even-numbered sections for the purpose of sale to persons who would settle and develop that land (see pages 15-19, *supra*), while simultaneously granting the odd-numbered sections to the railroad, it reserved a right of access to the even-numbered sections that was "necessary to fulfill the very purposes" for which the lands were retained.

Sieben, 46 Mont. 226, 127 P. 323 (1912);[12] *United States* v. *Buford*, 8 Utah 173, 30 P. 433 (1892), writ of error dismissed, 154 U.S. 496 (1893). Cf. *H.A. & L.D. Holland Co.* v. *Northern Pacific Ry. Co.*, 214 F. 920, 926 (9th Cir. 1914); *Northern Pacific Ry. Co.* v. *Cunningham*, 89 F. 595, 596 (S.D. Wash. 1898); *Hecht* v. *Harrison*, 5 Wyo. 279, 40 P. 306, 307 (1895). Contra, *Anthony Wilkinson Live Stock Co.* v. *McIlquam*, 14 Wyo. 209, 83 Pac. 364 (1905); *United States* v. *Douglas-Willan Sartoris Co.*, 3 Wyo. 287, 22 P. 92 (1889). In *Herrin* v. *Sieben*, *supra*, the court construed the intent of Congress in enacting the grant to the Northern Pacific Railroad, Act of July 2, 1864, ch. 216, 13 Stat. 356, as follows (127 P. at 328-329):

> The grant by the federal government to the railway company, so far as the question at issue is concerned, does not differ from a grant by one private person to another. It is impossible

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[12] *Herrin* v. *Sieben* was overruled in part by *Simonson* v. *McDonald*, 131 Mont. 494, 311 P.2d 982 (1957), which held that reserved easements of necessity had been abolished in Montana where eminent domain was available to acquire the claimed way. *Simonson* overruled *Herrin* insofar as *Herrin* recognized the implied easement doctrine in situations where the condemnation statute applied. 311 P.2d at 986. *Simonson* was in turn limited to its facts in *Thisted* v. *Country Club Tower Corp.*, 146 Mont. 87, 103, 405 P.2d 432, 440 (1965) ("there can be implied reservations or implied grants of easement by necessity in Montana, and insofar as the holding in *Simonson* v. *McDonald* * * * states to the contrary we must observe that the language therein used was too broadly put and should have been limited in its application to the facts existent in that case.").

to gain access to the even-numbered sections belonging to the government except by going over some portion of the odd sections. It must follow that there is an implied reservation by the federal government of a way of necessity, not only in favor of the government itself for access to these sections for any use to which it may wish to devote them, but also in favor of the private citizens who wish to go upon them for the purpose of making settlements thereon, or to cut timber when they may lawfully do so, or to explore them for mineral deposits, or, finally, to use them for grazing purposes. The contrary view would vest in the railway company a monopoly of all the public lands within the limits of the grant. * * * If the surface is such as to permit it, a way of reasonable width from one government section to another should be fixed in each case at the point where the corners join. If because of the broken character of the surface this should be ascertained not to be practicable in any instance, then another way should be selected of such width as may be necessary.

B. This Court's Decision In *Camfield* v. *United States* And Lower Court Decisions Construing The Unlawful Inclosures Act Provide Additional Support For The Court Of Appeals' Construction Of The Railroad Grants

This Court's analysis in *Camfield* v. *United States*, 167 U.S. 518 (1897), supports the decision of the court of appeals. The question presented in *Camfield* was whether a fence constructed by the petitioners, successors in title to odd-numbered sections granted to the Union Pacific, violated Section 3 of the Unlawful Inclosures of Public Lands Act, ch. 149, 23 Stat. 322, 43 U.S.C. 1063, which provides:

> [N]o person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct * * * free passage or transit over or through the public lands * * *.[13]

The petitioners contended that their fence, although it had the effect of enclosing the even-numbered sections of the public domain land within its perimeter, was lawful because it was constructed wholly on their odd-numbered sections. (See the diagram at 167 U.S. 520.) The Court concluded, however, that the fence violated the Unlawful Inclosures Act because it

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[13] The Unlawful Inclosures Act itself affords an additional indication of Congress's intention to reserve a right of access permitting entry onto and use of the retained public domain sections. By its terms, the Act created no new rights or interests. Rather it was remedial legislation to facilitate the enforcement of rights Congress had previously reserved. See 15 Cong. Rec. 4772 (1884). See *Western Wyoming Land & Live Stock Co.* v. *Bagley*, 279 F. 632 (8th Cir. 1922); *Stoddard* v. *United States*, 214 F. 566 (8th Cir. 1914); *Golconda Cattle Co.* v. *United States*, 201 F. 281 (9th Cir. 1912), rev'd on other grounds on rehearing, 214 F. 903 (1914); *Lillis* v. *United States*, 190 F. 530 (9th Cir. 1911); *Homer* v. *United States*, 185 F. 741 (8th Cir. 1911). Such subsequent legislation may properly be considered in determining the intent of an earlier statute. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). In *Northern Pacific Ry. Co.* v. *Cunningham*, 89 F. 595, 598 (S.D. Wash. 1898), the court expressly acknowledged the existence of an easement in favor of the public to reach the even-numbered sections, although it ruled against the defendant because he had exceeded the scope of the easement and depastured plaintiff's land.

cut off access to the public sections. This conclusion was bottomed on the Court's rejection of the contention, advanced again by petitioners in this case, that Congress's failure to reserve an express right of way must be conclusive (167 U.S. at 526):

> We are not convinced by the argument of counsel for the railway company, who was permitted to file a brief in this case, that the fact that a fence, built in the manner indicated, will operate incidentally or indirectly to enclose public lands, is a necessary result, which Congress must have foreseen when it made the grants, of the policy of granting odd sections and retaining the even ones as public lands; and that if such a result inures to the damage of the United States it must be ascribed to their improvidence and carelessness in so surveying and laying off the public lands, that the portion sold and granted by the Government cannot be enclosed by the purchasers without embracing also in such enclosure the alternate sections reserved by the United States. Carried to its logical conclusion, the inference is that, because Congress chose to aid in the construction of these railroads by donating to them all the odd-numbered sections within certain limits, it thereby intended incidentally to grant them the use for an indefinite time of all the even-numbered sections. It seems but an ill return for the generosity of the Government in granting these roads half its lands to claim that it thereby incidentally granted them the benefit of the whole.[14]

[14] Compare the Court's dictum, 167 U.S. at 527-528. Petitioners place considerable reliance on this dictum (Br. 36), but we read it as indicating at most that intent is an element of the criminal offense under the Unlawful Inclosures of Public Lands Act. Compare *Golconda Cattle Co.* v. *United States*, 201 F. 281 (9th Cir. 1912), rev'd on other grounds on rehearing, 214 F. 903 (9th Cir. 1914), with *Homer* v. *United States*, 185 F.2d 741, 745-746 (8th Cir. 1911).

Of course, petitioners here did not erect a fence around the perimeter of their checkerboard land holdings. But their refusal to allow access over any corner of their land in order to reach the interlocking sections of public domain operates effectively as an enclosure of those public lands. As the court of appeals pointed out in *Mackay* v. *Uinta Development Co.*, 219 F. 116, 118 (8th Cir. 1914), in upholding the right of sheepherders to cross private lands when passing from summer to winter range:

> The odd-numbered sections touch at their corners and their points of contact, like a point in mathematics, are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. As long as the present policy of the government continues, all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership.

The court of appeals concluded that the sheepherders were entitled to "a reasonable way of passage" across the privately owned land. *Id.* at 120.

This Court reached a similar result in *Buford* v. *Houtz*, 133 U.S. 320 (1890). In that case, the Court refused to enjoin sheepherders from moving their sheep across private checkerboard lands to the public domain. The Court held that "there is an implied license * * * that the public lands of the United States * * * shall be free to the people who seek to use them where they are left open and unenclosed." 133 U.S. at 326.

C. The Decisions Cited By Petitioners Are Not To The Contrary

There is no merit to petitioners' contention (Br. 10-12, 21-22) that this Court's decision in *Missouri, Kansas, and Texas Ry.* v. *Kansas Pacific Railway Co.*, 97 U.S. 491 (1878), and *Railroad Co.* v. *Baldwin*, 103 U.S. 426 (1880), foreclose the conclusion that Congress intended the reservation of a right of access which it did not expressly state. Neither of those authorities sheds light on the question whether a reserved right of access to retained landlocked sections is implicit in a checkerboard pattern where it is necessary to effectuate the purpose of both the grants and the retention.

In the *Kansas Pacific* case, two railroads claimed conflicting title to 90,000 acres of land under different congressional grants permitting each to locate its route through the lands in question. The Court rejected the claim that Congress had intended, in making the earlier grant in the Union Pacific Act, to reserve lands that might be selected by other railroads under subsequent congressional grants (97 U.S. at 498-499). The Court held that "[t]he rights of the contesting corporations to the disputed tracts are determined by the dates of their respective grants, and not by the dates of the location of the routes of their respective roads * * *." 97 U.S. at 501.

In *Railroad Co.* v. *Baldwin*, the Court considered the conflicting claims of the railroad and a homesteader who settled in 1869 on lands selected by the railroad for its right of way under the Act of June 23, 1866, ch. 212, 14 Stat. 210. The Court concluded that the Act excluded from the section grants to the railroad any odd-numbered sections to which a preemption or homestead right had attached prior to the date the location of the right of way was fixed. 14 Stat. 210. The railroad was expressly authorized to select other lands in lieu of those so excluded. In contrast, no such exception had been stated in the section of the Act granting the right of way, and the Court concluded that none was intended. The Court reasoned that Congress intended the grant of the right of way, unlike the grant of the odd-numbered sections, to be absolute and in praesenti, since allowing the railroad to select other lands if homesteaders settled on the right of way would impede the completion of the line. 103 U.S. at 430.

Neither *Kansas Pacific* nor *Baldwin* weighs against the proposition we assert here, which is that the reservation of a right of access to reach the retained public sections was implicit in the granting of sections com-

pletely surrounding those retained. Those cases reject the conclusion that Congress silently exempted, *in toto*, certain sections from the operation of the grants in question. Here, there is no dispute as to which sections were granted to the railroad. The only question is whether Congress in granting those sections reserved the right to enter on more than one hundred million acres of other sections that were retained as public lands. Nothing in either *Kansas Pacific* or *Baldwin* gainsays the conclusion that Congress's intent to reserve the necessary right of access was manifest in the plan of the railroad grants.

D. The Act Has Not Been Given A Contrary Administrative Interpretation

Petitioners place heavy reliance (Br. 14-16) on the district court's conclusion (Pet. App. v) that in more than 100 years no federal agency or official claimed that the railroad grants had reserved a right of access to the retained sections. Petitioners also assert (Br. 15) that the Secretary of the Interior "expressly determined nearly a century ago that nothing in either the Union Pacific Act or the Unlawful Inclosures Act permitted the United States to construct roads across the lands granted to the railroads without payment of just compensation * * *."

The 1887 Report of the Secretary of the Interior cited by petitioners provides no support for their contentions; to the contrary, it demonstrates that the Secretary viewed any obstruction by the railroads or their grantees of public passage between the retained

public sections as illegal. The Report includes a description of the government's efforts to enforce the Unlawful Inclosures Act, which the Secretary said were largely successful. 1 *Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1887* 12-13 (1887). The Secretary reported that the only locations where there were still illegal restraints on entry to the public sections were within the checkerboard grant areas (*id.* at 13):

> Only where corporate connivance and prodigal railroad grants came to their assistance have the cattlemen defied the law and rendered powerless the efforts of this Department to correct this abuse.

The Report then described the system of placing fences—like those in the *Camfield* case—wholly on railroad land but encircling many sections of public domain land as a "cunning device for violating the law" (*ibid.*). The Report stated that two prosecutions had been brought under the Unlawful Inclosures Act against railroad grantees who had fences of this variety, but that both prosecutions failed, "largely due, probably, to the presence upon the grand jury of men who were themselves violators in this evasive manner" (*id.* at 14-15).

It was in the context of this discussion of the Interior Department's difficulties in enforcing the right of access to the public sections that the Secretary made the suggestion that where grants had already been made, a strip of land four rods wide around each granted section should be condemned for

the construction of public roads (*id.* at 15): "When the land taken for such highways has passed from the government into the hands of private parties the bill should provide for necessary compensation." This proposal was quite different in scope from the right of access claimed here. The government claims a right of access to the retained sections—in this case, across two corners of petitioners' sections—but it does not claim and never has claimed that it reserved a right of way four rods wide along each side of all the sections granted to the railroads. The Secretary correctly recognized that the lands for such an extensive system of roads would have to be purchased or condemned.

There is simply no evidence to support the district court's conclusion (Pet. App. v) that the government had failed to claim any right of access since the time of the railroad grants. The government brought many enforcement actions under the Unlawful Inclosures Act to remove barriers to free passage.[15] Perhaps more significant, it is beyond question that the government did not, following the passage of the railroad grant acts, embark on a large-scale effort—or, so far as we are aware, any effort at all—to condemn rights of way into the retained public sections

[15] See, *e.g.*, *Camfield* v. *United States*, 167 U.S. 518 (1897); *Stoddard* v. *United States*, 214 F. 566 (8th Cir. 1914); *Cardwell* v. *United States*, 136 F. 593 (9th Cir. 1905); *McKelvey* v. *United States*, 273 F. 410 (9th Cir. 1921), aff'd, 260 U.S. 353 (1922).

in order to permit their development.[16] Yet under petitioners' theory, such an exercise of the right of eminent domain would have been necessary.

III. RECOGNITION THAT CONGRESS RESERVED A RIGHT OF ACCESS DOES NOT PLACE AN UNDUE BURDEN ON THE RAILROAD AND ITS GRANTEES

Recognition of the limited right of access Congress implicitly reserved does not, as petitioners charge (Br. 24), render all patents derived from the railroad grants "uncertain or open to challenge," nor does it place an undue burden on the railroads and their grantees.

As petitioners demonstrate (Br. 24-28), this Court has recognized that a patent provides the documentary evidence that the grantee's title has been perfected and that "all determinations essential to the

[16] Amici Union Pacific Railroad, *et al.* do not contend that there was such a program, but they assert that "[t]he public land records in the West reflect numerous transactions in which the United States has *purchased* easements or similar interests from the private owners of granted lands, including each of the amici" (Br. 18; emphasis in original). As already noted (page 30, *supra*), the United States is obligated to pay just compensation for the taking of any interest that exceeds the limited right of access implicitly reserved when the railroad grants were made. Amici do not claim that any of the purchases to which they refer were purchases of such limited access rights. But even if agents of the government did purchase such rights in some cases, their conduct could not estop the government from now claiming the rights that it reserved. See, *e.g.*, *United States* v. *Stewart*, 311 U.S. 60, 70 (1940).

passing of title have been made." *West* v. *Standard Oil Co.*, 278 U.S. 200, 214 (1929). In the context of the railroad grants, the Court has held that the railroad's patents may not be challenged on the ground that title should not have been granted.[17]

The government does not question the validity of the grants to the railroads or seek to challenge their title or that of their grantees. We seek only to enforce a reservation that was, we contend, implicit in the grants themselves. We claim—and the court of appeals upheld (Pet. App. xi)—only a right of way "to permit access to the even-numbered sections which were surrounded by lands granted the railroad." As we have shown, at common law a private grantor's intent to make such a reservation is recognized as implicit in the act of making the grant, and we have argued that the same intention was manifest in the checkerboard railroad grants, especially since lack of access would have frustrated Congress's intent.

This limited right of access does not place any undue burden on a railroad or its grantees. Since

[17] For example, in *Tarpey* v. *Madsen*, 178 U.S. 215 (1900), the Court held that the railroad's title could not be defeated by a claimant who testified that at the time the railroad filed its route with the General Land Office—the date on which its title could definitely be ascertained—the claimant had been homesteading on lands subsequently patented to the railroad. Likewise in *Burke* v. *Southern Pacific R.R. Co.*, 234 U.S. 669 (1914), the Court held that the reservation of "mineral lands" from the railroad grants (see, *e.g.*, 12 Stat. 492) reserved only lands determined to contain mineral deposits before the railroad received its patents, not lands patented and subsequently found to contain minerals.

implied easements were well known at common law, there is an extensive body of precedent to guide the courts in resolving disputes regarding the location of the government's way of access and the uses to which it may be put. See 3 R. Powell, *The Law of Real Property*, *supra*, at ¶ 416; *Restatement of the Law of Property*, *supra*, at § 474. Where more than an access way or road is required, the government must pay just compensation. The access way must be located, as it was in this case, so as to minimize the burden on the odd-numbered sections. In many cases that will mean a passage over the corners of the odd-numbered sections, but if that is not the minimal intrusion, the access road may be located elsewhere. See *Herrin* v. *Sieben*, *supra*, 127 P. at 328-329, quoted at pages 21-22, *supra*.[18] Furthermore, this right of access, springing from necessity as it does, is no longer enforceable once the lands in question have been developed and roads established. Cf. 3 R. Powell, *The Law of Real Property*, *supra*, at ¶ 422 (easements of necessity terminate when the necessity disappears). For that reason, the right has little, if any, application in settled areas.

There remain in the West today large undeveloped areas containing public lands in the checkerboard pattern. In these areas, denial of the government's right of access to its lands would have a severe adverse

[18] In the words of amici Union Pacific Land Resources Corporation, *et al.* (Br. 28), the right of access "must be limited by principles of minimum intrusiveness such as those applicable to common law easements."

effect, restricting both public use and government administration of a large segment of the public domain. Without a right of access, public hunting, fishing, and other recreational uses would be curtailed. Access to federally leased deposits of coal, oil, and gas resources would be restricted, with development of these resources consequently hindered and lease values impaired. Grazing access for government licensees would also be impeded. Denial of access would interfere with the government's ability to administer its lands, as by enforcing prohibitions against the destruction of natural resources. Even the government's ability to inventory the public lands would be restricted.[19]

In sum, a right of access to the retained sections of public lands was and still is necessary if anyone—

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[19] Indeed Congress recently enacted legislation authorizing the Secretary to "exercise the power of eminent domain only if necessary to secure access to public lands * * *." 43 U.S.C. 1715(a). The Senate committee reports recommending passage of this legislation urged that tracts of public property to which there was no convenient public access were being treated as "virtual private preserves." S. Rep. No. 583, 94th Cong., 1st Sess. 51 (1975). To the extent that this report may be read as suggesting that exercise of the power of eminent domain would be necessary to secure access to public checkerboard lands, we believe that the committee misconstrued the intention of the 37th Congress. We note that the Recommendation of the Public Land Review Commission on which the committee relied does not discuss the question of access to checkerboard public lands. See Public Land Law Review Commission, *One Third Of The Nation's Land* 214-215 (1970). (Although the Senate Committee Report refers to Recommendation 85, the reference is apparently to Recommendation 86.)

other than the owner of the alternate sections granted to the railroads—is to make use of the public sections. That right was reserved by the Congress when it made the grants to the railroads.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1686

LEO SHEEP COMPANY AND
PALM LIVESTOCK COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, AND
DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS

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Changing its theory once again, as it has done at every level of these proceedings, the United States now argues that Congress implicitly intended to reserve common law ways of necessity across the lands it granted for disposition by the railroad companies to finance railroad construction; to hold otherwise, respondent asserts, would simply be "inconceivable." Brief for the United States at 7. In the trial court, the United States — apparently knowing of no basis for imputing such intention to the

1862 Congress — merely contended that it was entitled as a matter of law to common law ways of necessity across petitioners' lands and that the Unlawful Inclosures of Public Lands Act of 1885, 43 U.S.C. §§ 1061-66, retroactively imposed rights of way on petitioners' lands. See Answer to Complaint, §§ 4, 12, R. 29-30; Defendants' Pre-Trial Memorandum at 1-2, R. 88-89; Defendants' Substituted Proposed Findings of Fact and Conclusions of Law, Conclusion Nos. 1-3, R. 307-08. In the Court of Appeals, the United States abandoned both of these theories and asserted instead, without support in legislative language or history or confirmation by administrative interpretation, that common sense compelled the conclusion that Congress in fact intended to reserve rights of way across the railroad grant lands. See Brief for the United States at 8-9. In this Court, the United States abandons its claim of any *actual* congressional intent in 1862 that rights of way be reserved, returning to a way of necessity theorem but relying now on a fictional intent it would infer from the common law rather than on an actual congressional purpose. Such vicissitudes in position manifest the difficulty respondent has apparently encountered in finding any factual or legal basis to support its conclusory assertion or the position of the Court of Appeals.

That respondent has also found it necessary to go far beyond the facts and issues stipulated in the trial court in an effort to characterize this case as one involving an unlawful obstruction of access to public lands in contravention of the Unlawful Inclosures Act is, we submit, a further acknowledgment of the weakness of its position on congressional intent. It seems to be saying to the Court, "if we don't have a right of way by implied

reservation, we may nonetheless preclude under the Unlawful Inclosures Act impediments to public land access." If this be so, respondent has remedies under the Unlawful Inclosures Act; it has not pursued them, however, and they are not at issue in this case.[1]

Amicus Energy Transportations Systems Inc. in its brief uses this case as a vehicle for presentation of arguments it is asserting in cases pending in the Tenth Circuit invo'ving subsurface crossings of the railroad right of way. See *Energy Transportation Systems, Inc. v. Union P.R.R.*, 456 F. Supp. 154 (D. Kan. 1978), *appeal pending*, Nos. 78-1680, 78-1681 (10th Cir.); *Energy Transportation Systems, Inc. v. Union P.R.R.*, 435 F. Supp. 313 (D. Wyo.

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[1]In its statement of facts to this Court, respondent includes several paragraphs ostensibly describing use of the public lands in the area of petitioners' lands and actions of petitioners or other parties with respect to such use. Brief at 3-4. These "facts" are derived from allegations in an amended answer filed by the Government after this case was submitted for decision on stipulated facts, R. 210, and are not contained in the stipulation of facts executed by the parties in the trial court, R. 107, or in the facts found by that court. Pet. App. ii-iii. The Court of Appeals so stated in its supplemental opinion in this case. Pet. App. xxiv.

Even if these allegations were facts, moreover, they would be irrelevant to this proceeding. This case is not an abatement action under the Unlawful Inclosures Act; rather, it is a case to quiet title against an asserted right-of-way reservation in a land grant made 23 years prior to enactment of that Act. Whether the circumstances that led to this action involved a denial by petitioners of public access to the east side of Seminoe Reservoir, as asserted by respondent and denied by petitioners, or involved activities by petitioners to protect their lands and operations from uncontrolled invasions and despoilment by hunters and other trespassers, as petitioners were prepared to show until the stipulation removed the question from the case (see Plaintiffs' Pretrial Memorandum at 3, R. 94), is of no relevance to the issue presented here; the question of title in this case depends upon construction of the 1862 grant to petitioners' predecessors, not actions of petitioners in the 1970's. If the United States believes that petitioners have unlawfully obstructed public lands, it has the option of invoking clear civil and criminal remedies under the Unlawful Inclosures Act; it has not elected to do so.

1977, *appeal pending*, No. 77-1770 (10th Cir.). These arguments are simply irrelevant to any question in the present case. Amicus acknowledges that no issue involving the railroad right of way granted under Section 2 of the Union Pacific Act is presented here, and it claims no interest in the lands granted under Section 3 of the Act that would be adversely affected by the decision in this case. See Brief of Energy Transportation Systems Inc. at 2-5. Moreover, amicus' insistence that Section 3 of the Act did not grant "unqualified" title, in that the grants under that section were limited by various express terms and conditions (unrelated to access rights) in the granting statute, is at most a semantic point without significance for this case; there is no dispute that all express statutory conditions of the grant were met or that such conditions were terminated by the patenting of the Section 3 lands to predecessors of petitioners.

This is a title case, involving only the question whether a right of way was reserved to the United States in 1862 across the lands granted under Section 3 of the Union Pacific Act; on that issue, arguments concerning access or the nature of the railroad right of way granted under Section 2 are not responsive, and the fictional intent now posited by the United States is insufficient as a matter of law to override clear contrary expressions of congressional purpose.

I. THE CHECKERBOARD FORM OF GRANT PROVIDES NO BASIS FOR NEGATING EXPRESS STATUTORY LANGUAGE.

The United States acknowledges that no right of way burdening petitioners' lands was expressly reserved from

the grant of lands under Section 3 of the Union Pacific Act. Brief at 6. It identifies no statutory language, congressional statement, or administrative interpretation over the past 115 years expressing or recognizing an intention by Congress to make such a reservation. Instead, it argues that the purpose of the land grant under the Union Pacific Act was to settle the lands *not* granted to the railroad companies, and that Congress must have intended to reserve rights of access over the railroad grant lands to achieve that purpose.

These premises of the United States are illusory and entirely erroneous. Although settlement of the West was no doubt a purpose of Congress in supporting transcontinental railroad construction, it clearly was not the purpose of the grants of the odd-numbered sections under Section 3 of the Union Pacific Act. Congress stated its purpose succinctly in Section 3 to be "aiding in the construction of [the] railroad," Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492, and this Court has confirmed that this was the *only* purpose for which the grants were made. See petitioners' opening brief at 19-20. This Court has uniformly held, in light of such purpose as well as the careful attention of Congress to the delineation of interests to be reserved from the grant, that no reservations can be implied by the courts in addition to those expressly stated by Congress. See petitioners' opening brief at 9-14.[2] Con-

[2]Respondent attempts to distinguish the decisions of this Court in *Missouri K. & T. Ry. v. Kansas P. Ry.*, 97 U.S. 491 (1878), and *Railroad Co. v. Baldwin*, 103 U.S. 426 (1880), on the theory that both cases involved the question whether certain sections had been implicitly reserved under railroad grant acts, while this case involves the question whether certain interests in admittedly granted sections had been reserved. Brief at 28. The holding in both cases was that, in view of clear statutory language and the over-all purposes of the railroad grant acts, the *only* reservations or exceptions from the

(Footnote continued next page)

gress itself considered and enacted the Unlawful Inclosures Act 23 years after the Union Pacific grant without mention in any debate or report of any reserved right of way that would provide access, and, after having been alerted to the right-of-way issue by the Secretary of the Interior after the Unlawful Inclosures Act had been enacted, confirmed the patents to the railroad grant lands without reservation. See petitioners' opening brief at 27-29, 34-36 nn. 17-18.[3]

Congressional intent must be judged from the perspective of the Congress that enacted the Union Pacific Act. *Platt v. Union P.R.R.*, 99 U.S. 48, 64 (1878). As the *Platt* decision suggests, Congress had no basis in 1862 for assuming that the checkerboard pattern would survive, but rather undoubtedly thought that the railroad lands would be settled in precisely the same way the retained even-numbered sections might concurrently be settled under the Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392. Under Section 3 of the Union Pacific Act, all lands granted

grants were those clearly intended by Congress, *i.e.*, those expressly stated. That is to say, congressional intent was manifested by what Congress said. One case involved the grant of the support lands, the other involved the grant of a right of way, but in both cases the result was the same: when limitations were intended by Congress, they were made expressly. See also *United States v. Denver & R.G. Ry.*, 150 U.S. 1, 11 (1893). Consistent authorities of this Court, cited on pages 12-14 of our opening brief, are to the same effect in other contexts.

[3] As pointed out by respondent, as recently as 1975 Congress assumed that it had not reserved ways of access to lands that are landlocked. See Brief for the United States at 34 n. 19. In its comprehensive study of the Nation's public lands, the Public Land Law Review Commission recommended that Congress develop a program for acquiring rights of way to landlocked lands, including lands "intermingled" with private lands. *One Third of the Nation's Land* 214-15 (1970). Respondent has identified no congressional statement in the 115 years following the Union Pacific Act expressing the view that rights of way had been reserved in 1862 over the lands granted under Section 3 of that Act or any other checkerboard grant legislation.

that were not "sold or disposed of" within three years after completion of the railroad were subject to "settlement and preemption, like other lands," at a price of $1.25 per acre to be paid to the railroads. Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492. Until the 1878 decision in *Platt*, sixteen years after the grant, recognized that the grant lands had been "disposed of" by large-scale mortgaging within the meaning of Section 3, Congress presumably anticipated that the lands within the boundaries of the railroad grants would be settled and developed contemporaneously with the homesteaded lands, and that access to tracts in the odd-numbered sections would be obtained, where needed, the same as access to tracts in even-numbered sections or in parts of the public domain other than checkerboard areas, *i.e.*, by cooperative development of roads in the normal course, through dedication, condemnation or public or private license.[4] Thirty-five years of experience with checkerboard grants had apparently not suggested anything to the contrary (see petitioners' opening brief at 17-18); 115 years of experience subsequent to the Union Pacific grant has seen the West settled with no apparent need, much less necessity, for the rights of way now asserted.

Further, if the question of access to the retained lands for development was of paramount congressional concern,[5] that concern would have been equally manifested

[4] Even after the *Platt* decision, when the Secretary of the Interior brought the access problem to Congress, he did not try to alter by interpretation what had previously been done by Congress but instead tried to secure corrective action by Congress in the form of condemnation legislation. See page 11, *infra*.

[5] Respondent places great reliance in this regard on the "double-minimum" policy proffered by advocates of the land grants as a justification for utilizing the land grants to subsidize the railroad. Brief at 17-19. In fact, the Union Pacific Act *omitted* the provision for doubling the minimum price for the retained lands that had been present in previous grant acts. See P. Gates, *History of Public Land Law Development* 366-67 (1968). Thus, under the Govern-

with respect to access to and settlement on the lands granted to the railroads. Yet, even now the Government denies that Congress intended to grant access rights to those lands over the public lands as an incident to the railroad grants. Brief at 11 n. 7.[6]

Finally, acceptance of the premise that Congress reserved a right of way by implication across each section of the granted lands would defeat not only the stated purpose of the grants, *i.e.*, aid in construction of the road, but also the purpose assumed by the Government, *i.e.*, the settlement of the West. Only by granting marketable title to the vendees of the Section 3 lands could Congress insure that the companies be able to raise funds, by mortgage or sale, to finance the railroad. It is difficult to imagine a more sweeping impairment of marketability of the granted lands than the Government is asserting in this case.[7] In its own words, uncompensated access is necessary for "public hunting, fishing, and other recreational uses . . . [a]ccess to federally leased deposits of coal, oil and gas resources . . . [g]razing access," and access for administration of the public land laws and inventory of the public lands. Brief at 34. Untold thousands of property owners who purchased their lands

ment's own premise, the development and sale of the retained lands clearly was not uppermost in the congressional mind in 1862.

[6] The United States argues that it was not necessary for Congress to grant such access rights to the railroads and their successors because the Act of July 26, 1866, ch. 263, 14 Stat. 253, *codified in* 43 U.S.C. § 932, granted the right of way for construction of highways over public lands. Brief at 11 n.7. This act, of course, was passed four years *after* the Union Pacific Act, when the existence of such rights of way was yet unestablished.

[7] It is for this reason that respondent's reliance on decisions like *Cappaert v. United States*, 426 U.S. 128 (1976), is misplaced, since the implication of rights of way benefitting the lands retained necessarily impairs title to the lands granted.

without knowledge of any claim by the Government of an interest therein are now to be subject to uncompensated public intrusion for a myriad of public purposes. In this case, the United States does not even seek access to particular even-numbered sections surrounded by petitioners' lands but rather asserts the right to construct a road across petitioners' lands for public access to a vast recreation area that could not have been envisioned in 1862. The effect on the security of titles to these lands could hardly be more profound.[8]

The Government has identified no legislative history or condition existing in 1862 that would have led the Congress to intend right-of-way reservations in derogation of its grant. To the contrary, the conditions giving rise to the Government's claim and the decision of the court below have twentieth century origins. They are, to put it simply, the current desire of the United States to build roads across patented lands in pursuit of current programs without meeting landowner requests for protection of the private lands and without payment of compensation, and a judgment by the Court of Appeals that, if Congress were making checkerboard grants of public lands today, with benefit of hindsight, it ought to re-

[8] The resulting title problems would affect persons other than present owners of the granted lands. The American Land Title Association, at page 6 of its brief to this Court in support of the petition for certiorari in this case, expressed concern that under the decision below,

> the members of this Association as insurors of titles, and attorneys who render opinions as to the state of titles, must hereafter exhibit to prospective transferees of land derived from federal and state grants, an exception, as an encumbrance on the title, for the claimed easement; and each may very well be subjected to claims for liabilities of staggering amounts to persons who have already received such insurance or opinions.

The railroad companies and their successors who have conveyed the granted lands for over 100 years by unrestricted warranties of title may under the decision below be liable for breach of their warranties.

serve access ways for benefit of the lands retained. Neither purpose is legally sufficient under decisions of this Court to justify a judicial revision of the 1862 act.

II. THE CURRENT ASSERTION BY THE UNITED STATES OF RIGHTS OF WAY BURDENING THE RAILROAD GRANT LANDS REVERSES MORE THAN A CENTURY OF CONSISTENT ADMINISTRATIVE RECOGNITION THAT NO SUCH RIGHTS OF WAY EXIST.

The United States has not identified in its brief any action by any federal official over the past 115 years evidencing a recognition or belief that Congress had reserved implied rights of way over the lands granted to the railroad companies. To the contrary, the United States acknowledges that it has *purchased* such rights of way when they were needed. See Brief for the United States at 31 n. 16.

Respondent claims only that the Secretary of the Interior in his 1887 report to Congress implicitly assumed the existence of implicit rights of way and asked only for legislation that would broaden the rights. Brief at 28-30. In fact, beginning with his report for the year 1882, the Secretary annually and at great length complained about the access problems that had developed with respect to public lands — especially checkerboard lands — and never once asserted that the United States had reserved rights of way by implication or otherwise in the railroad grant acts. See, *e.g.*, reports of the Secretary cited at page 34 n. 17 of petitioners' opening brief. One would expect that the strong concern of the Government for retaining or protecting access to public land would have produced an expression by some Government

official over the past 115 years to the effect that the United States had reserved rights of way for such access; respondent identifies no such statement. One would further expect, if enclosure problems were as critical in the range wars of the 1880's and 1890's as the Secretary described to the Congress, that the Secretary would have exercised whatever authority Congress had given him in 1862 to reserve rights of way in the patents that were subsequently issued to railroad grant lands. He did not do so in any of the patents through which petitioners claim in this case (Pet. App. ii), and the United States has identified no such reservation in any other patent.

Finally, respondent has not cited any case in which the United States, as party or amicus, has asserted a right of way over the railroad grant lands. To the contrary, until this case, the Government accepted the limitation on access identified by the Secretary in his 1887 report to Congress. As set out at page 29 of respondent's brief, the Secretary himself acknowledged without question that the railroad grants had come "to the assistance" of the cattlemen and rendered "powerless" the efforts of his Department to remedy the problem. In pursuit of a solution to the access problem, the Secretary recommended legislation that would permit the United States to *condemn* rights of way along the section lines of the lands previously granted. The Secretary's request and the subsequent judicial positions of the United States are entirely inconsistent with the notion that the United States had retained rights of way over the railroad grant lands.

It is thus clear that the United States is now reversing its longstanding interpretation of the railroad grants in an effort to take rights of way without paying

for them or otherwise proceeding in accordance with law as it has in the past. The authorities cited on pages 22-31 of petitioners' opening brief preclude such effort even if the interest now claimed by the United States in fact existed; that it does not exist is manifest from over a century of administrative practice.

III. CONGRESSIONAL INTENT TO IMPAIR THE TITLES TO FEE LANDS GRANTED TO THE RAILROAD COMPANIES CANNOT BE IMPUTED FROM, OR OVERRIDDEN BY, THE COMMON LAW DOCTRINE OF WAYS OF NECESSITY.

The United States argues that under the common law, in the absence of "inescapable evidence to the contrary," a grantor "necessarily intends to reserve a right of way where that is essential for access to his remaining property," and that this "implicit intent" must be recognized in the case of the congressional railroad grants since all "doubts" are resolved in favor of the Government. Brief at 10. Respondent acknowledges, however, that in this case, as always with congressional grants, it is congressional intent that controls. *Missouri, K. & T. Ry. v. Kansas P. Ry.*, 97 U.S. 491, 497 (1878); *Schulenberg v. Harriman*, 88 U.S. (21 Wall.) 44, 62 (1874).

Acordingly, actual congressional intent to grant unimpaired title to the support lands conveyed to the railroads must prevail over any fictional intent imputed by the common law, which is properly applicable only to transfers between private parties. *Missouri, K. & T. Ry.*

v. Kansas P. Ry., supra, 97 U.S. at 497.[9] We have shown in petitioners' opening brief how the intent to vest absolute title in grantees of the support lands was manifested by Congress, recognized by federal officials, and confirmed by this Court. Brief at 9-22. Respondent does not challenge that showing.[10] See pages 5-12, *supra*. Thus, any intent imputed to Congress by respondent under the common law may not override the actual intent manifested by the Congress.

Beyond this, however, the intent on which respondent relies is imputed under the common law only when the proponent of a way of necessity establishes that *necessity* exists for creation of the easement.[11] When necessity is established, the courts will presume that the parties intended that a right of way exist to satisfy it (although this presumption is rebutted by evidence of

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[9] Even under the common law rules, the cases recognize that a way of necessity is negated by any evidence showing that the parties did not intend one to arise. See, *e.g.*, *Marzo v. Seven Corners Realty, Inc.* 171 F.2d 144 (D.C. Cir. 1948); *Lebus v. Boston*, 107 Ky. 98, 51 S.W. 609 (1899); *Daywalt v. Walker*, 217 Cal. App. 509, 31 Cal. Rptr. 899, (1963); *Orpin v. Morrison*, 230 Mass. 529, 120 N.E. 183 (1918); *Sayre v. Dickerson*, 278 Ala. 477, 179 So. 2d 57 (1965); 3 R. Powell, *The Law of Real Property* ¶ 410, at 34-71 to -72 (1978).

[10] The absence of any ambiguity in the grant of the Section 3 lands removes any basis for applying the rule that such ambiguities are to be resolved in favor of the Government; respondent has not even attempted to identify any ambiguity in the language of the Act. The principle that all doubts are to be resolved in favor of the Government, moreover, does not justify the "withholding of that which it satisfactorily appears the grant was intended to convey," *Russell v. Sebastian*, 233 U.S. 195, 205 (1914); see *United States v. Denver & R.G. Ry.*, 150 U.S. 1, 14 (1893).

[11] Because of the concern that a grantor not detract from his grant, the cases hold that the implication of ways of necessity by *reservation* rather than by grant is not favored and is limited to ways of *strict* necessity. See, *e.g.*, authorities cited in 2 G. Thompson, *Real Property* § 362, at 420 n. 84 (1961); *United States v. Rindge*, 208 F. 611, 620 (S.D. Cal. 1913); 5 *Restatement of Property* § 476, comment c (1944).

actual intent: see note 9, *supra*). See 2 G. Thompson, *Real Property* § 364, at 431 (1961); 3 R. Powell, *The Law of Real Property* ¶ 410, at 34-60, 34-65 to 34-72 (1978). "[W]hether easements by necessity are believed to be products of public policy or to be the embodiments of inferences as to the intent of the parties, they should be establishable by proof that they are necessary to the reasonable utilization of the claiming dominant parcel." 3 R. Powell, *supra*, ¶ 410, at 34-69; see 2 G. Thompson, *supra*, § 364. If no necessity is proved to exist, no intent to reserve a right of way is imputed; necessity in this context, in other words, is the mother of intention.[12]

Thus, no intent to reserve ways of necessity burdening the lands granted under Section 3 of the Union Pacific Act can be imputed to Congress; the United States, as sovereign, can always create whatever access it needs and thus cannot make the requisite showing of necessity. The trial court so held in this case, and the authorities uniformly agree. *E.g., State v. Black Bros.*, 116 Tex. 615, 629-30, 297 S.W. 213, 218-19 (1927); *Pearne v. Coal Creek Min. & Mfg. Co.*, 90 Tenn. 619, 627-28, 18 S.W. 402, 404 (1891). The existence of the power of eminent domain quite simply negates the necessity for inferring a substitute for it. See, *e.g., Alcorn v. Reading*, 66 Utah 509, 518-20, 243 P. 922, 926 (1926); *Simonson v. McDonald*, 131 Mont. 494,

[12] When the common law doctrine is thus understood, it becomes apparent that respondent's present reliance on the common law doctrine is in effect a concession that Congress did not in fact intend to reserve any right of way over the railroad grant lands. What the United States seeks in this case is nothing less than judicial implication of an intent nowhere manifested by Congress, in contravention of both the rule that congressional intent is determinative in the construction of federal grants and the limitation on the role of the judiciary in construing such grants. See *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Light v. United States*, 220 U.S. 523, 537 (1911).

497-501, 311 P.2d 982, 984-86 (1957); *Backhausen v. Mayer*, 204 Wis. 286, 234 N.W. 904 (1931).[13]

The United States, grantor of hundreds of millions of acres of public lands, is not by any measure in the same position as that of a private grantor who conveys an isolated parcel of land. As the court said in *United States v. Rindge*, 208 F. 611, 619 (S.D. Cal. 1913), in rejecting the contention that the United States could assert a way of necessity on behalf of the public:

> A doctrine so contrary to the general theory of the rights acquired by patentees of public lands and guaranteed to private owners by the Constitution challenges attention. Its effect is strikingly apparent in the case at bar. The result of the government's position, if sustained, will be to divide the Malibu Ranch by what are in effect public highways into 10 or 12 different tracts, thus materially impairing its value and usefulness to the owner, and that without compensation. It is, in my judgment, very doubtful whether the doctrine of implied ways of necessity has any application to grants from the general government, under the public land laws. . . . The public domain is disposed of under general laws, and the rights conferred and reserved are defined by such laws, and rules and regulations made in pursuance thereof. If the sale or conveyance of one portion of such domain prevents access to another, it would

[13] Further, the effort by the United States in this case to assert necessity as a justification for constructing a road across petitioner's lands for public access to a reservoir not in existencce in 1862 at the time of severance would not suffice under the common law rules, since a claimant cannot himself create a "necessity" which did not reasonably exist at the time of the original severance. See 3 R. Powell, *supra*, ¶ 410, at 34-70.

> seem to be a contingency which the government was bound to contemplate in making the conveyance. . . . [I]t would seem that the government . . . reserves to itself or its subsequent grantees no interest in the land granted except such as may appear on the face of the grant, or the law under which it was made, or be declared by a general statute in force at the time the interest of the grantee was acquired.

Other cases refusing to find the existence of ways of necessity in grants of the sovereign include *Guess v. Azar*, 57 So. 2d 443, 445 (Fla. 1952); *Bully Hill Copper Mining & Smelting Co. v. Bruson*, 4 Cal. App. 180, 182-83, 87 P. 237, 238 (1906); *Thomas v. Morgan*, 113 Okla. 1212, 240 P. 735 (1925); *McIlquam v. Anthony Wilkinson Live Stock Co.*, 18 Wyo. 53, 104 P. 20 (1909).[14]

Further, under the law of Wyoming, where petition-

[14] Many of these cases refused to find easements of necessity on behalf of the sovereign for the additional reason that such easements would have to be reciprocally implied over the public lands. *E.g., United States v. Rindge, supra*, 208 F. at 619; *Pearne, v. Coal Creek Min. & Mfg. Co., supra*, 90 Tenn. at 627-28, 18 S.W. at 404; *Guess v. Azar, supra*, 57 So. 2d at 445; *Bully Hill Copper Mining & Smelting Co. v. Bruson, supra*, 4 Cal. App. at 182-83, 87 P. at 238. Even the decision cited by the United States, *United States v. Buford*, 8 Utah 173, 30 P. 433 (1892), *writ of error dismissed*, 154 U.S. 496 (1893), so holds. Respondent's attempt to invoke the rule for its own benefit and at the same time deny its logical reciprocal for the benefit of those claiming against the United States (Brief at 11 n. 7) serves only to emphasize the lack of authority and equity for the position of the United States in this proceeding. Beyond this, however, if the owners of land in the odd-numbered sections could assert no necessity for the implication of roads across the even-numbered sections because of the Act of 1866 approving construction of highways, as the Government contends (see note 6, *supra*), the same rationale appears equally applicable to deny the necessity of roads across the odd-numbered sections for access to privately owned lands in the even-numbered sections, in light of both the Government's eminent domain authority and the presumption that homesteaders of the even-numbered sections would have access available through the common interest of settlers in the area in the development of access roads.

ers' lands are situated, even a private party does not have a way of necessity in the circumstances of this case. The Wyoming rule is that the checkerboard lands are *not* burdened with ways of necessity for benefit of the retained lands. *McIlquam v. Anthony Wilkinson Live Stock Co*., 18 Wyo. 53, 104 P. 20 (1909). In addition, a Wyoming statute permits the condemnation of ways of access on behalf of a landlocked property owner on payment of compensation. Wyo. Stat. Ann. §§ 24-9-101 to -104 (1977). In *Snell v. Ruppert*, 541 P.2d 1042 (Wyo. 1975), the Wyoming Supreme Court stated that this statute provides complete relief to a landlocked property owner, and thus removes any need to resort to common law ways of necessity. 541 P.2d at 1046. Thus, no private owner of land in the even-numbered sections within the boundaries of the railroad grant in Wyoming may assert a way of necessity over any part of the odd-numbered sections.

Under the decision below, and the reasoning of respondent here, the United States, which has the power to take whatever access it needs, would be entitled to such ways in situations where private parties are not, and would be free of any obligation to pay just compensation where private parties would be required to make such payments. Respondent cites no evidence of congressional intent to place the United States in such a favored position; the requirement that the United States pay a fair price for land that it takes imposes no special burden on the United States not shared by any other Wyoming landowner.

IV. THE BROAD-BRUSH CLAIM OF THE UNITED STATES THAT ITS POSITION IS SUPPORTED BY A "CLEAR MAJORITY" OF THE DECIDED CASES HAS NO FOUNDATION IN FACT.

Petitioners can find no basis in the briefs or elsewhere for the unqualified assertion by the United States that the "clear majority" of the decided cases are in accord with the decision below implying the existence of reserved ways across the lands granted by the United States in 1862. Brief at 20. The statement ignores all the authorities cited herein negating such implication, see pages 12-17, *supra*, and is premised upon authority that is either no longer good law or upon analysis supports the position of petitioners rather than that of respondent.

Respondent argues that the decision of this Court in *Camfield v. United States*, 167 U.S. 518 (1897), requires affirmance of the decision below because the supposed "refusal [of petitioners] to allow access over any corner of their land in order to reach the interlocking sections of public domain operates effectively as an inclosure of those public lands." Brief at 20. *Camfield*, however, was concerned with a scheme to appropriate exclusive use of the public lands by the erection of fences on borders of contiguous fee sections, and it held that under the Property Clause, U.S. Const., Art. IV, § 3, cl. 2, the Unlawful Inclosures Act could constitutionally reach such activities on private lands. Cf. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). The Court in *Camfield* did not determine that the United States had reserved rights of way across the odd-numbered checkerboard sections. On the contrary, the Court expressly recognized that the owner of the odd-numbered sections had absolute and unqualified title to these lands, emphasizing that he would "doubtless" have the right to fence each section separately since "he is entitled to the complete and exclusive enjoyment of [his own land], regardless of any detriment

to his neighbor." 167 U.S. at 527-28.[15] A determination by the Court that the United States had rights of way in defendants' land would have disposed of the entire controversy and mooted the constitutional issue decided by the Court, since the fences in such event would have been situated on easements of the United States rather than on lands owned exclusively by defendants.

Respondent's reliance on *Buford v. Houtz*, 133 U.S. 320 (1890), is similarly misplaced. As we showed at pages 38-39 of petitioners' opening brief, *Buford* did not purport to hold that there existed a reservation of public rights in private lands but, like *Camfield*, involved ac-

[15] Respondent characterizes this statement, and the Court's accompanying elaboration that the Unlawful Inclosures Act permitted abatement only of fences "intended to enclose the lands of the Government," 167 U.S. at 528, as "dictum" indicating "at most that intent is an element of the criminal offense" under the Act. Brief at 24-25 n. 14. The statement of the Court is not on its face so limited, and *Camfield* itself was a civil case. Moreover, in support of this characterization of the Court's language, respondent cites a decision of the Ninth Circuit in a *civil* action under the Act for abatement of fencing, *Golconda Cattle Co. v. United States*, 201 F. 281 (9th Cir. 1912), which the Ninth Circuit *reversed* on rehearing on the ground that intent to appropriate public lands was a necessary element of proof in a civil case under the Act. 214 F. 903, 909 (9th Cir. 1914). The intent requirement was applied in several other civil cases in the Ninth Circuit. *E.g., United States v. Rindge*, 208 F. 611, 623-24 (S.D. Cal. 1913); *United States v. Johnston*, 172 F. 635 (N.D. Cal. 1908). The other case cited by respondent, *Homer v. United States*, 185 F. 741 (8th Cir. 1911), was a decision of the predecessor of the court below in a civil case which refused to follow the statement in *Camfield* and held that lack of intent was *not* a defense to an abatement proceeding under the Act. Judge (later Justice) Van Devanter dissented from this holding. 185 F. at 747.

After the decision in *Camfield*, several other courts, including the Wyoming Supreme Court, have recognized that a landowner may fence his own land or otherwise make legitimate use of it in such manner as to deny access over it to the public lands, and that nothing in the Unlawful Inclosures Act or any other act of Congress requires a contrary result. *Anthony Wilkinson Live Stock Co. v. McIlquam*, 14 Wyo. 209, 224-28, 83 P. 364, 368-69 (1905); *State v. Bradshaw*, 53 Mont. 96, 103, 161 P. 710, 713 (1916); *Sacra v. Jones*, 37 N.M. 40, 43, 17 P.2d 552, 554 (1932); *Callison v. Ronstadt*, 21 Ariz. 348, 138 P. 266 (1920); *Stapp v. Nickels*, 150 Mont. 220, 434 P.2d 141 (1967).

tivities designed to monopolize the *public* lands. The decision of the Eighth Circuit, predecessor to the court below, in *Mackay v. Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), also cited by the Government, is to the same effect.[16] *Buford*, like *Camfield*, in fact confirms the lack of existence of any reserved right of way in the United States; it relied on fencing law rather than publice servitudes to support the open range practices of the time.

The remaining authorities cited by respondent are either fencing law cases like *Camfield* and *Buford*,[17] involve the railroad right of way rather than the railroad

[16] To the extent that *Mackay* may be construed as a holding that the Unlawful Inclosures Act permits willful trespass over fenced checkerboard lands for access to public lands, it would contravene not only the Court's decision in *Camfield* but also its subsequent decisions in *Lazarus v. Phelps*, 152 U.S. 81 (1894) and *Light v. United States*, 220 U.S. 523, 537 (1911), and would be contrary to the cases cited in footnote 15, *supra*. See also *Cosgriff v. Miller*, 10 Wyo. 190, 222-24, 68 P. 206, 211-12 (1902); *Healy v. Smith*, 14 Wyo. 263, 83 P. 583 (1906); *Anthony Wilkinson Live Stock Co. v. McIlquam*, 14 Wyo. 209, 227-28, 83 P. 364, 369 (1905).

[17] *Jastro v. Francis*, 24 N.M. 127, 172 P. 1139 (1918), *writ of error dismissed*, 249 U.S. 581 (1919), cited by respondent, was an access case presenting the same fence law issue as that addressed by this Court in *Buford v. Houtz*, 133 U.S. 320 (1890). It has been construed by the New Mexico Supreme Court to have held only that one who fails to mark the boundaries of his land as required by statute was not entitled to an injunction against the trailing of stock thereon. *Sandoval v. Chavez*, 27 N.M. 70, 196 P. 322, 322-23 (1921). Nowhere in *Jastro* did the court mention the existence of any way of necessity reserved by the United States, and the case, like the other fencing cases, was in fact decided on grounds *negating* the existence of any such right of way. See also *Gutierrez v. Montosa Sheep Co.*, 25 N.M. 540, 543, 185 P. 273, 274 (1919); *Sacra v. Jones*, 37 N.M. 40, 43, 17 P.2d 552, 554 (1932).

In *Northern P. Ry. v. Cunningham*, 89 F. 594 (C.C. D. Wash. 1898), the court merely assumed for purposes of argument that defendant had a way of necessity across plaintiffs' lands but held that the existence of such a way would not protect defendant from an injunction against his trailing of sheep across plaintiff's lands because of a state statute making unlawful the pasturing of sheep on lands of another.

grant lands,[18] or have been subsequently overruled by authorities confirming that no way of necessity exists in favor of a landowner vested with eminent domain authority.[19]

[18] *H. A. & L. D. Holland Co. v. Northern P. Ry.*, 214 F. 920, 926 (9th Cir. 1914) states only that Congress undoubtedly contemplated that crossings of the railroad right of way would be necessary; this Court had previously made the same assumption, and in fact had coupled this assumption with the recognition that the police power of the states would be necesary to accomplish such crossings. *Northern P. Ry v. Townsend*, 190 U.S. 267, 272 (1903). The nature of rights in the railroad right of way granted under Section 2 of the Union Pacific Act is not involved in this case.

[19] In *Hecht v. Harrison*, 5 Wyo. 279, 40 P. 306 (1895), the court specifically *refused* to determine whether the United States had reserved ways of necessity burdening the lands granted to the Union Pacific Railroad Company, see 5 Wyo. at 284, 40 P. at 307, and in fact subsequently that court held that no such ways existed. *McIlquam v. Anthony Wilkinson Live Stock Co.*, 18 Wyo. 53, 104 P. 20 (1909).

Herrin v. Sieben, 46 Mont. 226, 127 P. 323 (1912), which respondent quotes at length (Brief at 21-22), was subsequently "expressly overruled" by the Montana Supreme Court on the ground, *inter alia*, that the existence of statutory eminent domain authority in private persons to create access roads negated the necessity required to imply common law easements. *Simonson v. McDonald*, 131 Mont. 494, 501, 311 P.2d 982, 986 (1957). In *Thisted v. Country Club Tower Corporation*, 146 Mont. 87, 103, 405 P.2d 432, 440 (1965), cited by respondent, the Montana Supreme Court refused to extend *Simonson* to preclude construing a deed to impose on the transfers of condominium units implied equitable servitudes requiring that the units be used for residential purposes only. *Simonson* was limited by the court "to the facts existent in that case," which involved claimed ways of necessity across checkerboard lands, and was not taken as authority for the negation of all implied covenants in the state. Thus, it is clear that *Herrin v. Sieben* has been expressly overruled in Montana on the precise point involved in this case.

United States v. Buford, 8 Utah 173, 30 P. 433 (1892), *writ of error dismissed*, 154 U.S. 496 (1893), was a case presenting the same issue later decided by this Court in *Camfield*, *i.e.*, whether the Unlawful Inclosures Act could be applied to abate fencing on private checkerboard lands intended to enclose public lands. Since there was doubt whether the Act could reach such fencing, see *United States v. Douglas-Willan Sartoris Co.*, 3 Wyo. 287, 22 P. 92 (1889), the Utah court in *Buford* held that the United States had reserved ways across the grant lands so that the fences of defendants obstructing such ways could not be maintained. The subsequent decision of this Court in *Camfield*, upholding the power of Congress to abate fences on private lands intended to enclose public lands, removed the need for this rationale, and in fact the Utah Supreme Court itself subsequently

(Footnote continued next page)

V. CONCLUSION.

It is not the function of a court, on hindsight, to impute a purpose to Congress it clearly did not have; to do so would be to usurp the legislative authority of Congress. Perhaps the clearest evidence of the lack of necessity for the reservation of access easements in the checkerboard grants is the very paucity of cases to which the United States refers. It seems fair to assume that the necessity presumed by respondent would have prompted substantial litigation or remedial legislation over the 115 years since the Union Pacific grant. In fact, this case appears to be the first instance in which the United States has asserted the right it claims here; the reason perhaps is, as acknowledged by the United States, that officers of the United States have heretofore purchased such access ways as were needed.

At all times since 1862, the United States has had ample means of protecting its interest and safeguarding the rights of the public with respect to public lands. Indeed, when the United States acquired petitioners' lands for the flooding of Seminoe Reservoir, it could easily have acquired rights of way thereto. It hardly comports with Fifth Amendment notions of due process and just compensation for the United States now to visit the consequences of this past oversight on petitioners.

For the reasons stated herein and in petitioners' opening brief, petitioners respectfully pray that the

recognized that ways of necessity could not be implied where the power of eminent domain provided a suitable alternative. *Alcorn v. Reading*, 66 Utah 509, 243 P. 922 (1926); *Adamson v. Brockbank*, 112 Utah 52, 185 P.2d 264 (1947). The court in *Buford* also held that ways of necessity existed across the even-numbered sections for access to the odd-numbered sections, a holding which the United States claims here to be erroneous. See note 6, *supra*.

judgment of the Court of Appeals be reversed and that the judgment of the District Court quieting petitioners' titles against the United States be affirmed.

Respectfully submitted,
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No. 77-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

LEO SHEEP COMPANY AND PALM LIVESTOCK COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, AND
DIRECTOR, BUREAU OF LAND MANAGEMENT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF UNION PACIFIC LAND RESOURCES CORPORATION, SOUTHERN PACIFIC LAND COMPANY AND SANTA FE PACIFIC RAILROAD COMPANY AS *AMICI CURIAE*

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Amici have received and filed with the Clerk of the Court letters from counsel for Petitioners and Respondents consenting to the filing of this Brief.

OPINIONS BELOW

The opinions below are listed in the Brief of Petitioners and are set forth in Appendices A and B to the petition for writ of certiorari.[1]

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[1] The appendices contained in the petition for writ of certiorari are cited herein as "Pet. App."

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit were entered on May 17, 1977. Pet. App. vi. The Court of Appeals entered a supplemental opinion and order denying petitioners' timely petition for rehearing on February 28, 1978. Pet. App. xxi. The petition for writ of certiorari was filed on May 26, 1978, and granted on October 2, 1978. This Court has jurisdiction to review the opinion and judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492, *as amended,* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358 ("the Union Pacific Act") and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66, which are set forth in Appendix C to the petition for writ of certiorari.

QUESTION PRESENTED

Whether Congress intended to reserve public rights-of-way across the lands granted by Congress under the Union Pacific Act, although there is no evidence of such an intent in the Act or its legislative history and although the United States has never before claimed any such rights-of-way in the some 110 years since the Act was passed.

INTERESTS OF AMICI CURIAE

1. *Union Pacific Land Resources Corporation (UP Land).*—UP Land is a wholly-owned subsidiary of Upland Industries Corporation, which in turn is owned by Union Pacific Corporation. Union Pacific Corporation also owns Union Pacific Railroad Company, which operates a 15,800-mile rail system in the western United States.

Under the Union Pacific Act of 1862 as amended, Congress granted to the first Union Pacific Railroad Company ("the Union Pacific") all the odd-numbered sections of public land within 20 miles of each side of its original right-of-way, extending from the Missouri River west to what is now the State of Utah. The even-numbered sections were retained by the Government, giving rise to a checkerboard pattern of alternating private and public ownership in a 40-mile belt along the railroad line. The primary purpose of the grant, which comprised a total of some 18.8 million acres, was to encourage and assist the Union Pacific in the construction of its railroad. See, *e.g., Platt* v. *Union P. R.R.,* 99 U.S. 48, 59-60 (1878).

Over the past century, lands granted to the Union Pacific under the Act have been conveyed and reconveyed in countless separate transactions. UP Land presently owns the fee to the entire estate in some 865,000 acres of the original grant. Title to the other 18 million acres, subject to certain retained interests,[2] is dispersed among thousands of private owners, including the petitioners in the present case.

While this case is immediately concerned only with some 50,000 acres of grant lands in which petitioners own an interest, the decision below also directly affects the holdings of UP Land. The Court of Appeals has imputed to the 1862 Congress a heretofore undiscovered

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[2] UP Land holds various excepted and reserved interests in the grant lands that it or its predecessors conveyed to others.

intent to reserve an easement for public rights-of-way across *all* the lands granted under the Union Pacific Act. Pet. App. ix-xi. Since UP Land's grant-land holdings far exceed those of petitioners, the potential impact of the decision below on UP Land is far greater than the threat to the immediate parties.

2. *Southern Pacific Land Company (SP Land).*—SP Land is a wholly-owned subsidiary of Southern Pacific Company. Southern Pacific Company also owns Southern Pacific Transportation Company, which operates a 14,000-mile rail system in the West and Southwest.

The Southern Pacific system includes a line of railroad running from San Francisco to Utah, where it meets the original line of the Union Pacific. In the Union Pacific Act, Congress granted lands along the right-of-way of that Southern Pacific line to the Central Pacific Railroad Company of California. The grant to the Central Pacific was made on the same terms and conditions as the grant to the Union Pacific under the same Act,[3] and thus extended the checkerboard pattern of public and private ownership across the entire West.

Some eight million acres of land were ultimately conveyed under the grant originally made to the Central Pacific. SP Land presently holds fee title to approximately 1.8 million acres of those lands. Accordingly, SP Land has the same direct and substantial interest as UP Land in the decision of the Court of Appeals holding that Congress intended, without ever

[3] See Act of July 1, 1862, ch. 120, § 9, 12 Stat. 494, *as amended*, Act of July 2, 1864, ch. 216, § 4, 13 Stat. 358.

saying so, to reserve public rights-of-way across the lands granted under the Union Pacific Act.[4]

3. *Santa Fe Pacific Railroad Company (Santa Fe Pacific).*—Santa Fe Pacific is a wholly-owned subsidiary of Santa Fe Industries, Inc., which also owns all the stock of The Atchison, Topeka & Santa Fe Railway Company. The Santa Fe Railway operates some 12,000 miles of railroad between Chicago and California.

Santa Fe Pacific holds title to about 150,000 acres of the more than 13 million acres originally granted by Congress to its predecessor in title, the Atlantic & Pacific Railroad Company, under the Act of July 27, 1866, ch. 278, § 3, 14 Stat. 292, 294-95 ("the Santa Fe Act").[5] Like the grants under the Union Pacific Act, the Santa Fe grant was of odd-numbered sections on each side of the railroad right-of way. Thus, Santa Fe Pacific's grant lands are held in the same checkerboard pattern of ownership as are the grant lands of UP Land and SP Land.

Although the decision below does not address the intent of Congress in the Santa Fe Act, it nevertheless

[4] SP Land also holds fee title to some 1.7 million acres of lands originally conveyed from public to private hands by checkerboard grants made in three other railroad land-grant statutes. *See* Act of July 25, 1866, ch. 242, § 2, 14 Stat. 239-40; Act of July 27, 1866, ch. 278, § 3, 14 Stat. 292, 294-95; Act of March 3, 1871, ch. 122, § 9, 16 Stat. 573, 576. The court below did not address Congress' intent in any of these other acts; but its decision may nevertheless pose a risk for SP Land's interest in the lands granted under these acts as well. See p. 6, below.

[5] The properties of the Atlantic & Pacific Railroad Company were acquired by Santa Fe Pacific pursuant to the Act of March 3, 1897, ch. 374, § 1, 29 Stat. 622. Most of the granted lands were subsequently conveyed to other parties.

poses a substantial threat to Santa Fe Pacific's interest in the lands granted under that Act. The Court of Appeals' decision is not based on any express language in the Union Pacific Act or any underlying legislative history reflecting a congressional intent to reserve rights-of-way across the granted lands. See Pet. x-xi. Santa Fe Pacific is, therefore, confronted with the serious risk that the United States will assert in due course that the lower court's facile analysis of congressional intent is no less applicable to the Santa Fe grant than it is to the grants made in the Union Pacific Act.

STATEMENT OF THE CASE

Amici adopt the petitioners' statement of the case.

SUMMARY OF ARGUMENT

The question in this case is whether Congress intended, without saying so, to reserve public rights-of-way across the lands granted under the Union Pacific Act. It is undisputed that no intent to reserve rights-of-way was expressed by Congress in any manner, either in the Act itself or in its legislative history.

The Court of Appeals' sole ground for concluding that Congress intended to reserve such easements was its assumption that a prudent Congress seeking to encourage settlement of the West would have done so. But no need for reserved rights-of-way was apparent to the 1862 Congress, whose intent is controlling in construing the Union Pacific Act. By 1862, Congress had already made a number of checkerboard land grants without any provision for reserved rights-of-way, and no controversy had arisen suggesting that a reservation was required. Nor did the Government find it necessary

to assert any reserved right of access for more than 100 years after the Union Pacific Act was passed.

Even if the court's hindsight were more persuasive as to the need for a reservation in 1862, it still would not permit judicial implication of an unexpressed reservation for rights-of-way. Unexpressed reservations are not to be implied in congressional grants such as the Union Pacific Act, both because of the limited role of the judicial branch in construing those grants, and because of the long-recognized importance of certainty and predictability in matters affecting title to land.

The decision of the court below unsettles thousands of titles derived from the Union Pacific grants, covering vast areas of western land. The owners of these lands have relied not only on the unqualified language of the Act, but on the Government's failure to claim any reserved rights-of-way during the first some 110 years after the grants were made. The Secretary of the Interior recognized very early that the Act did not give the Government a right of access across granted lands without compensation to the owner; and consistently with that construction, the Government has frequently purchased rights-of-way from grant-land owners. This established administrative construction and practice precludes the belated implication of a reservation that has gone unasserted for so long.

The authorities relied upon by the Court of Appeals as reflecting some congressional and judicial recognition of the existence of reserved rights-of-way under the Union Pacific Act—namely, the Unlawful Inclosures Act of 1885 and two decisions of this Court that did not involve the Union Pacific Act or any other land-grant act—do not in fact support the decision reached

below. To the extent that those authorities have any relevance at all, they only provide further evidence that no rights-of-way were reserved.

Finally, nothing in the Court of Appeals' opinion provides any reliable basis for limiting the scope of the rights-of-way that it implied solely from an unexpressed intent. This lack of a limiting principle, such as the concept of minimum intrusion applicable to implied easements of necessity at common law, aggravates the cloud on land-grant titles resulting from the court's opinion, and confirms that unexpressed easements should not be implied in land-grant statutes. And if the Court of Appeals' holding were to be affirmed, this Court should at least make clear that the right of access implied must be narrow in scope, minimally intrusive, and reciprocally available for the benefit of private owners in the checkerboard seeking access across Government sections.

ARGUMENT

The Court of Appeals imputed to Congress an intent to reserve easements for public access across each section of the 34 million acres of land originally granted under the Union Pacific Act. Pet. App. xi. Such an intent was nowhere expressed by Congress; it is inconsistent with established administrative construction and practice under the Union Pacific Act; and it is unsupported by the authorities relied on by the court below.

I. Congress Did Not Intend Any Reservation for Rights-of-Way.

The question in this case is solely one of Congress' intent in making the Union Pacific grant.[6] There is

[6] This Court has repeatedly stressed that Congress' intent in making such grants should not be determined by reference to the rules of the common law, "which are properly applicable only to transfers between private parties." *Missouri, K. & T. Ry.* v. *Kansas P. Ry.*, 97 U.S. 491, 497 (1878); accord, *e.g.*, *United States* v. *Southern P. R.R.*, 146 U.S. 570, 598 (1892); *Tarpey* v. *Madsen*, 178 U.S. 215, 227 (1900). For this and other reasons (see p. 26 n. 42, below), it has been found in this case that the United States could not resort to rules of the common law to imply an easement that Congress did not reserve in making the Union Pacific grant.

no issue as to whether the public may obtain access to public-land sections in the land-grant checkerboards. As the Solicitor General has pointed out,[7] the question of public access to those sections has not been a matter of controversy during the century and more since the checkerboards were created. In the checkerboards, as elsewhere, the United States has the power to secure any necessary rights-of-way by the exercise of its power of eminent domain; and where it does so, established principles of just compensation ensure that it will not be compelled to pay more than a fair market price.[8]

The court below decided that where the United States requires rights-of-way across lands granted under the Union Pacific Act, it need not deal with the owners of such lands in the same fashion that it deals with other private landowners. Instead, the court purported to discover, 110 years after the fact, a right of access tacitly reserved by the 1862 Congress as a qualification of the Union Pacific grant. Such a congressional grant is "a law as well as a transfer of the property . . . ," *e.g.*, *Schulenberg* v. *Harriman*, 88 U.S.

[7] Brief of the United States, *et al.*, in Opposition to Petition for Certiorari, at 14 (Aug. 1978).

[8] See, *e.g.*, *United States* v. *Miller*, 317 U.S. 369 (1943); *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 81 (1913); *McGovern* v. *City of New York*, 229 U.S. 363, 371-72 (1913).

44, 62 (1874), and its terms must therefore be ascertained by reference to the intent of Congress, see, *e.g.*, *Wisconsin C. R.R.* v. *Forsythe,* 159 U.S. 46, 55 (1895); *United States* v. *Southern P. R.R.,* 146 U.S. 570, 598 (1892).

As an interpretation of congressional intent, the Court of Appeals' decision cannot stand. There is no evidence of any intent to reserve rights-of-way in the language or the legislative history of the Union Pacific Act, and no permissible ground for imputing such an intent to the 1862 Congress.

A. Congress Nowhere Expressed Any Intent to Reserve Rights-of-Way.

In ascertaining congressional intent, "[t]he starting point in every case . . . is the language" of the statute itself. *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring); accord, *e.g., Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 492 (1977). As the Court of Appeals acknowledged (Pet. App. x), there is "no express reservation of an easement" in the Union Pacific Act. On its face, the Act gave unqualified and absolute title to the granted lands.[9]

[9] Section 3 of the Union Pacific Act provides: "That there be, and is hereby, granted to the said [grantee railroads] . . . every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, . . . and within the limits of ten miles on each side of said road. . . ." Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492, *as amended,* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 358 (grant enlarged to encompass ten alternate sections per mile of railroad, within twenty miles on each side of the road). As this Court has previously observed, " 'There be and is hereby granted' are words of absolute donation . . . ." *Leavenworth, L. & G. R.R.* v. *United States,* 92 U.S. 733, 741 (1875).

Other provisions of the Act affirmatively indicate that Congress intended no qualification of the grantees' titles. The Act expressly excepts from the grant various categories of property, including lands to which preemption or homestead claims had attached and lands that had already been sold, reserved or otherwise disposed of by the United States.[10] Had Congress also intended to reserve rights-of-way, that reservation too —as this Court has previously recognized in analogous circumstances—would almost certainly have been expressed; the fact that none was expressed would appear "conclusive" that none was intended. See *Railroad Co.* v. *Baldwin,* 103 U.S 426, 430 (1881). See also *Stuart* v. *Union P. R.R.,* 227 U.S. 342, 353 (1913).[11]

The legislative history of the Act serves only to confirm this conclusion. Nowhere in the legislative history is there *any* suggestion that Congress intended to reserve rights-of-way. On the contrary, the legislative history reveals that proposals for reservations to allow access over the granted lands were unsuccessfully raised in the consideration of both the 1862 Act itself

[10] See Act of July 1, 1862, ch. 120, § 3, 12 Stat. 492, *as amended,* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 358.

[11] Congress has long made *express* provision for reservations in other contexts in which it wished to reserve rights-of-way. See Act of Aug. 30, 1890, ch. 837, § 1, 26 Stat. 391, *codified in* 43 U.S.C. § 945 (right-of-way for canals and ditches to be reserved in patents for certain designated lands); Act of Feb. 25, 1920, ch. 85, § 29, 41 Stat. 449, *codified in* 30 U.S.C. § 186 (easements and rights-of-way for certain purposes to be reserved from any permit, lease, occupation or use with respect to mineral lands of the United States); Act of July 24, 1947, ch. 313, 61 Stat. 418 (right-of-way for roads to be reserved in patents issued by the United States for Alaskan lands), *repealed by* Alaskan Omnibus Act, § 21(d)(7), 73 Stat. 146 (1959).

and its precursor in 1859.[12] In these circumstances, the inference is compelling that Congress contemplated no such reservation in enacting the Union Pacific Act.[13] Cf., *e.g., Blau* v. *Lehman,* 368 U.S. 403, 411-413 (1962); *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 305-06 (1933).

B. There Is No Basis for Imputing to Congress an Unexpressed Intent to Reserve Rights-of-Way.

The decision below is based not on any evidence of an actual congressional intent, but on the Court of Appeals' own view that the 1862 Congress should have reserved rights-of-way from the Union Pacific grant. The court's conjecture as to what a prudent Congress would have done in 1862 is unfounded. And in any event it cannot justify implying an unexpressed qualification in the statutory grant.

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[12] When Congress was considering the precursor of the Union Pacific Act in 1859, Senator Simmons argued that "every grant of land" should contain a "reservation" preserving "a right to go through it." Cong. Globe, 35th Cong., 2d Sess. 579 (1859). The legislation was subsequently passed by the Senate without the reservation for which Senator Simmons argued. See *id.* at 634. In 1862, Congress specifically considered and rejected an amendment to the Act that would have reserved a right of public entry onto the granted lands for purposes of exploring for and mining minerals. See Cong. Globe, 37th Cong., 2d Sess. 1909-10 (1862).

[13] Because it is clear from both the language and the legislative history of the Act that Congress did *not* intend any reservation for rights-of-way, there is no basis for applying in this case the principle that ambiguities in a public grant should be resolved in favor of the Government and against the private grantee, see, *e.g., Northern P. Ry.* v. *United States,* 330 U.S. 248, 257 (1947). That principle of construction does not "justify the withholding of that which it satisfactorily appears the grant was intended to convey." *Russell* v. *Sebastian,* 233 U.S. 195, 205 (1914); accord, *United States* v. *Denver & R.G. Ry.,* 150 U.S. 1, 14 (1893).

The Court of Appeals found itself "unable" to accept the conclusion compelled by an examination of the language and legislative history of the Act. Pet. App. xi. The court declared that Congress' underlying purpose in granting lands to aid construction of the western railroads was "to give access to the unsettled territories and to encourage settlement and development of those lands;" and it asserted that a reservation for rights-of-way across the granted lands was necessary to further this general purpose. Pet. App. xi. To hold that no easement-of-way had been reserved, the court said, "would be to ascribe to Congress a degree of carelessness or lack of foresight, which . . . would be unwarranted." Pet. App. xi.

The lower court's view of sound legislative policy for the checkerboard grants might seem plausible from a contemporary perspective, but the Act must be construed from the viewpoint of the Congress that passed it. See, *e.g., Platt* v. *Union P. R.R.,* 99 U.S. 48, 64 (1878); *United States* v. *Union P. R.R.,* 91 U.S. 72, 81 (1875). From that perspective, no need to provide for reservations of rights-of-way was apparent.

By 1862, Congress already had the benefit of long experience with checkerboard grants. It had been making grants in checkerboard form since the 1820's, in aid of highways and canals as well as railroads.[14] None of these prior land-grant statutes provided for any reservation of rights-of-way across the granted lands; and, so far as can be determined, no such reservation had

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[14] See, *e.g.,* Act of March 3, 1827, ch. 56, 4 Stat. 236 (canal); Act of March 3, 1827, ch. 93, 4 Stat. 242 (road); Act of June 18, 1838, ch. 114, § 1, 5 Stat. 245 (canal); Act of Sept. 20, 1850, ch. 61, § 2, 9 Stat. 466 (railroad).

been asserted by the Government under any of them. The absence of a reservation for rights-of-way in these grants appears not to have created any significant difficulty.[14] In these circumstances, the 1862 Congress had no reason to perceive a need to reserve rights-of-way. And given the development that the West has enjoyed over the past 100 years without the reservation just discovered in the decision below, it is hardly obvious that Congress' failure to share the court's modern perception of such a need reflects any "carelessness or lack of foresight" (Pet. App. xi).

But assuming that the omission of reserved rights-of-way could be considered neglectful, the omission cannot be repaired by implying a reservation that Congress never mentioned. This Court made clear a century ago that the grants made under the Union Pacific Act are subject only to such reservations as are expressed in the statute. In *Missouri, K. & T. Ry.* v. *Kansas P. Ry.*, 97 U.S. 491 (1878), the Court said "there can be no reasonable doubt" that Congress' intent in the Act "was to aid in the construction of the [rail]road by a gift of lands along its route, *without reservation of rights, except such as were specifically mentioned* . . . ." *Id.* at 497 (emphasis added).[15] Under

[14] An examination of the Annual Report of the Commissioner of the General Land Office for the years 1827 through 1862 has failed to reveal any claim of reserved rights-of-way in the prior land-grant statutes or any problem of access across granted lands.

[15] At issue in *Missouri, K. & T. Ry.* was some 90,000 acres of land in Kansas. Kansas Pacific Railway claimed the land under a grant made to its predecessor in the Union Pacific Act of 1862; Missouri, Kansas & Texas Railway claimed the same land under an 1863 congressional grant. The Court held that Kansas Pacific's title to the lands "took effect by relation as . . . of 1862," upon location and construction of its road, "so as to cut off all intervening claim-

that principle, the Court of Appeals was not free to imply a reservation for rights-of-way, no matter how strongly it believed that rights-of-way were required."

The Court has had good reasons to adhere so closely to the express terms of congressional land grants. In the first place, under Article IV, § 3, cl. 2 of the Constitution, "[t]he power over the public lands [is] entrusted to Congress . . . *without limitations*."[16] *E.g.*, *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940) (emphasis added). In light of this allocation of constitutional authority, the Court has emphasized on a number of occasions that "it is not for the courts to say how that trust shall be administered"; rather, it is solely "for Congress to determine" on what terms and conditions public lands are to be used, conveyed or retained."[17] *Light* v. *United States*, 220 U.S. 523, 537

ants *except in cases where reservations were specifically made*" in the Union Pacific Act. 97 U.S. at 498 (emphasis added). Since the 1862 Act was silent regarding the reservation of "any portion of the designated lands for the purpose of aiding in the construction of other roads" (*id.* at 498-99), the Court concluded that full title to the disputed lands "had already passed from the government" to Kansas Pacific when Congress made the 1863 grant, and the Missouri, Kansas & Texas could claim nothing. *Id.* at 500-01.

[16] Cf. *Railroad Co.* v. *Baldwin*, 103 U.S. 426, 430 (1881) ("[W]here any qualification is intended in the operation of the grant of lands, . . . it is designated."). See also *Stuart* v. *Union P. R.R.*, 227 U.S. 342, 353-54 (1913).

[17] Article IV, § 3, cl. 2 provides in pertinent part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

[18] In accordance with this view, administrative authorities, in issuing land patents, likewise may not reserve or limit what Congress has in fact granted. See, *e.g.*, *Shaw* v. *Kellogg*, 170 U.S. 312, 337-38 (1898); *Deffeback* v. *Hawke*, 115 U.S. 392, 406 (1885).

(1911); accord, *e.g.*, *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 294-95 (1958); *United States* v. *California*, 332 U.S. 19, 27 (1947).

The policy of restrained judicial construction of land grants is also rooted in the fact that these grants are the foundation of land titles across the West. Where land titles are concerned, the law has traditionally recognized the special need for certainty and predictability, on which both the value and the marketability of land depends.[20] That venerable principle of the common law applies with full force to the construction of land-grant statutes.[21] Indeed, this Court recognized long ago that a construction of a statute that might "disturb numerous titles" should be eschewed, "unless clearly the proper one."[22]

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[20] In another context, this Court has emphasized that Congress "intended" that such grants as the Union Pacific Act "should be of present force, . . . *with reasonable certainty.*" *Tarpey* v. *Madsen*, 178 U.S. 215, 227 (1900) (emphasis added).

[21] The need for certainty is clearly recognized in this Court's determination in *Missouri, K. & T. Ry.* that Congress intended to make an absolute conveyance of the lands granted in the Union Pacific Act, subject only to such reservations "as were *specifically mentioned*." See p. 14, above. The Court placed considerable reliance on the fact that its "construction" of the Act should "prevent controversies" in the future over title to lands granted not only in the Union Pacific Act itself but also in "all similar congressional grants." 97 U.S. at 497-98.

[22] *Beals* v. *Hale*, 45 U.S. (4 How.) 37, 52 (1846). See also *Louisiana* v. *Garfield*, 211 U.S. 70, 76 (1908) ("[L]ong continued understanding [of] . . . special provisions" of a statute would not be overturned on the basis of a "general clause" in subsequent legislation, where the proposed construction would disturb "a great number of titles to a very large amount of land."); *Lessee of Doolittle* v. *Bryan*, 55 U.S. (14 How.) 563, 567 (1852) ("[A] court should be . . . astute in avoiding a construction which may be productive of much litigation and insecurity of titles.").

The wisdom of that policy is dramatized by the potential effect of the decision below. Over the past century, the lands originally granted to the railroads under the Union Pacific Act have passed to thousands of private owners, including the petitioners in this case, on the assumption of clear and certain title. By indulging its own 20th Century notion of sensible policy, the court has cast a cloud of indefinite scope over these thousands of titles.[23] A construction productive of such uncertainty and unfairness should be rejected unless compelled by a clear expression of congressional intent.[24] It must certainly be rejected here, where there is not only an absence of clear expression of such an intent, but no expression at all.

II. Established Administrative Construction and Practice Confirm the Absence of Any Reservation for Rights-of-Way.

In construing a statute, this Court accords "considerable weight" to a "consistent and longstanding interpretation" of the statute by the authorities responsible for its administration. *E.g.*, *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975). Administrative construction and practice have often guided the Court in construing railroad land grants such as the Union Pacific Act. See, *e.g.*, *United States* v. *Union P. Ry.*, 148 U.S. 562, 571-72 (1893); *Southern P. R.R.* v. *United States*, 189 U.S. 447, 452 (1903). The Government's construction and practice under the Union Pacific Act are inconsistent with the reservation asserted in this case, and thus provide an independent reason why the courts should decline to imply such an unexpressed reservation at this late date.

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[23] See p. 28 n.45, below.

[24] See cases cited p. 16 n.22, above.

As early as 1887, the Department of the Interior construed the railroad land grants, including the Union Pacific grant, *not* to have reserved any rights-of-way across the granted lands. In that year, the Secretary of the Interior recommended that legislation be enacted establishing a public highway around the boundaries of each section of western land, with the section lines marking the highway's center. The purpose was to ensure access to all public lands, including the even-numbered public sections surrounded by odd-numbered sections that had been granted to private parties. Recognizing that Congress had not reserved any rights-of-way in such grants as the Union Pacific Act, the Secretary observed that the legislation he proposed "should provide for necessary compensation" for the property to be taken from sections previously granted to the railroads and others.[23]

This Interior Department construction of the grants is not only longstanding but also, until this case, consistent. The public land records in the West reflect numerous transactions in which the United States has *purchased* easements or similiar interests from the private owners of granted lands, including each of the amici. So far as we can determine, this is the first occasion on which the United States has asserted that it already holds a reserved right-of-way across any lands granted

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[23] I *Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1887*, at 15 (1887).

It is not difficult to understand why the Department of the Interior adopted this view. In an administrative decision rendered in 1885, the Commissioner of the Department's General Land Office held that where Congress had provided for express reservations from granted lands, no other reservations could be implied. See *Northern P. R.R.* v. *Miller*, reported in I *Report of the Secretary of the Interior for the Year Ending June 30, 1885*, at 353, 354 (1885).

in the Union Pacific Act.[24] As the trial court expressly found, "[f]or 110 years after the grant of fee lands made to the Union Pacific Railroad Company, neither the Department of the Interior nor any other agency . . . of the United States construed the grant . . . as conferring any right upon the United States . . . or the public to traverse the lands granted to the railroad." Pet. App. v.

The longstanding failure of administrative authorities to claim any reserved rights-of-way is especially significant here. The reservation at issue is not the type of interest that would have gone unasserted by generations of public land officials if in fact such a reservation were thought to exist.[25] The absence of any such "assertion . . . by those who presumably would be alert" to make it is persuasive evidence that no right-of-way was reserved. Cf. *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941). See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949).

Moreover, the silence of a century of public land officials has been relied upon in countless land transactions throughout the West. The lands granted under the Union Pacific Act have been conveyed and reconveyed with no notice of any reservation for public rights-of-way; successive purchasers have acquired the lands, agreed to prices, and made improvements on the

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[24] None of the cases upon which the court below relied (Pet. App. xii-xvi) involved an assertion, much less a recognition, of any reservation for rights-of-way in the United States. See pp. 24-26, below.

[25] Even before the trial court in this case, the United States did not assert any implied reservation of rights-of-way; it was only in the Court of Appeals that the United States first invoked such a theory. See Pet. App. xxv.

assumption that they would enjoy clear title.[29] This extensive reliance on administrative silence should preclude the implication of a contrary congressional intent in this case even if the absence of any evidence of such an intent did not.[30]

III. The Authorities Relied on in the Decision Below Provide No Support for the Conclusion That Congress Intended a Reservation for Rights-of-Way.

The Court of Appeals purported to find some congressional and judicial recognition that rights-of-way had been reserved from the Union Pacific grant, in the Unlawful Inclosures Act of 1885, 43 U.S.C. §§ 1061-66, and in this Court's decisions in *Camfield* v. *United States*, 167 U.S. 518 (1897), and *Buford* v. *Houtz*, 133 U.S. 320 (1890). Pet. App. xi-xvi. The court's reliance on these authorities was misplaced. None of them refers to any reservation for rights-of-way in the grants made under the Union Pacific Act or even purports to construe that Act. Instead, the cited authorities are concerned with issues of access wholly unrelated to Congress' intent in the Union Pacific Act. To the extent

[29] Some indication of the number of transactions and owners involved can be seen in the fact that UP Land and SP Land together now hold only some 2.6 million of the 34 million acres granted under the Union Pacific Act.

[30] Cf. *Iron Silver Mining Co.* v. *Elgin Mining & Smelting Co.*, 118 U.S. 196, 208 (1886), where the Court emphasized that rejection of the Land Department's longstanding construction of the statute at issue "would disturb titles derived" from the Land Department's patents and "lead to great confusion and litigation." Cf. also *United States* v. *Union P. Ry.*, 148 U.S. 562, 572 (1893), where the Court interpreted the Act at issue consistently with "the construction placed upon it by the Land Department for eighteen years, under which construction [the relevant] lands [had] been put upon the market and sold . . . ."

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e Ins. Co. v. *Lederer*, 252 U.S. 523, 537-

ties. And neither gives any indication that the statute is premised on the existence of such a reservation or was intended to enforce any existing right of access over private lands.

The Unlawful Inclosures Act was adopted to remedy the distinct problem of intentional appropriation of public lands by certain private owners, who were "enclosing large areas of lands of the United States . . . [as] mere trespassers, without a shadow of title to such lands, and surrounding them by barbed wire fences . . . ."[32] *Cameron* v. *United States,* 148 U.S. 301, 305 (1893). In accordance with this purpose, the Act is addressed in terms only to unlawful "inclosures of . . . public lands . . . of the United States" and to "prevent[ing] or obstruct[ing] any person from peaceably entering upon . . . or transit[ing] over . . . *public* lands" by use of "unlawful means."[33] 43 U.S.C. §§ 1061, 1063 (emphasis added). In view of its focus on the unlawful appropriation of the public domain,[34] the Act restricts

[32] As a leading authority on public land law has noted, by the 1880's, "[h]undreds and thousands of acres of public land were illegally fenced and threats of violence made against anyone who cut the fences." P. Gates, *History of Public Land Law Development* 467 (1968). The Unlawful Inclosures Act "was designed to prevent [such] illegal fencing of public lands. . . ." *Omaechevarria* v. *Idaho,* 246 U.S. 343, 349-50 (1918).

[33] "Unlawful means" include the use of "force, threat, intimidation, . . . fencing or inclosing . . . ." 43 U.S.C. § 1063.

[34] Representative Payson, the sponsor of the Act in the House, explained the Act's purpose as follows:

> "[M]illions of acres of the public lands are held and fenced in by people who have no shadow of claim to an acre of them. . . .
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> "It is to open this land up to sale and settlement that this bill is introduced. . . . [T]he evil which is sought to be cured is that which prevents an American citizen from making a settlement upon the public lands, which he is prevented from doing for the reason that they are fenced by foreigners. . . ." 15 Cong. Rec. 4769 (1884).

See also S. Rep. No. 979, 48th Cong., 2d Sess. 1 (1885) ("The necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent."); H.R. Rep. No. 1325, 48th Cong., 1st Sess. 7 (1884); 15 Cong. Rec. 4769 (1884) (remarks of Rep. Henley); 15 Cong. Rec. 4770 (1884) (remarks of Mr. Rogers).

the use of private lands only insofar as such use constitutes a "mere subterfuge" for enclosing and monopolizing public lands; otherwise, the statute was "not intended to interfere with" private owners' rights to the exclusive use and enjoyment of their property.[35] Thus, the Unlawful Inclosures Act provides no indication that the 1885 Congress believed the Congress in 1862 had reserved general rights-of-way across any land-grant lands.[36]

[35] *United States* v. *Rindge,* 208 F. 611, 623 (S.D. Cal. 1913); accord, *Camfield* v. *United States,* 167 U.S. 518, 528 (1897), *quoted at* pp. 24-25, below. See also *Golconda Cattle Co.* v. *United States,* 214 F. 903 (9th Cir. 1914); *Potts* v. *United States,* 114 F. 52 (9th Cir. 1902).

[36] The Court of Appeals apparently believed that Congress passed the Unlawful Inclosures Act in order to keep open reserved public rights-of-way over the lands granted under the Union Pacific Act and other similar land-grant acts. But, if that had been Congress' purpose, the Unlawful Inclosures Act plainly was unnecessary, since the United States unquestionably could have sued in its proprietary capacity to keep any reserved public rights-of-way open and unobstructed. Cf. *Camfield* v. *United States,* 167 U.S. 518, 525 (1897). Indeed, if—as the Court of Appeals evidently thought—Congress was concerned in 1885 with access over previously granted private lands, the enactment of the Unlawful Inclosures Act would seem ultimately to indicate that the 1885 Congress did *not* believe that public rights-of-way across the granted lands had been reserved. In any case, as shown above, Congress' true concern in enacting the Unlawful Inclosures Act was to prevent unlawful monopolization of public lands and not to create or enforce any right of access over private lands.

This Court's decision in *Camfield* v. *United States, supra,* on which the Court of Appeals also relied, merely applied the Unlawful Inclosures Act to the very practice that the Act was passed to prevent. Private owners of odd-numbered sections that were originally part of the Union Pacific grant had built fences on their property enclosing eighteen sections of Government land. As constructed, the fences were completely useless for enclosing any of the private lands; they could only have been intended to enclose and appropriate the lands of the Government." The Court found that the fences were "certainly within the letter" of the Unlawful Inclosures Act and sustained the constitutionality of the Act as applied to the defendants' transparent attempt to monopolize the enclosed public lands.[38] See 167 U.S. at 522-28.

Nowhere in the decision did this Court suggest that the United States held any reserved rights-of-way across the defendants' lands. On the contrary, the Court emphasized that the owner of granted land "is

[37] The defendants' fences enclosed an entire township containing 36 sections of land. On each side, the fence was located just inside the outer section line of the three odd-numbered, privately owned sections and just outside the outer section lines of the three even-numbered, publicly owned sections. As a result, no individual section was enclosed on four sides by the fence; it was obvious that the fence was intended solely to enclose the entire township including the Government's land. See diagram printed in 167 U.S. at 520.

[38] The defendants argued that the Unlawful Inclosures Act was unconstitutional if "construed so as to apply to fences upon private property." 167 U.S. at 522. The Court found such application of the Act to be within Congress' constitutional power to require abatement of "nuisances" affecting United States property. See *id.* at 525. The Court placed no reliance on any retained public right in the relevant private properties.

entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor," so long as he "confines his enclosures to his own land." *Id.* at 528. Thus, the Court clearly recognized that owners of lands granted under the Union Pacific Act and other similar acts held absolute and unqualified title to their land, and might fence their lands for legitimate purposes even if they thereby incidentally prevented access to adjacent public lands. As a result, *Camfield* reflects, if anything, a "judicial recognition" (Pet. App. xvi) that Congress did *not* reserve any general rights-of-way in making the Union Pacific grant.[39]

Nor does *Buford* v. *Houtz, supra,* reflect any judicial recognition that Congress intended to reserve from the Union Pacific Act a right of access over the granted lands. That decision was concerned solely with a 100-year-old "custom" allowing sheep and other livestock to run free and graze upon unenclosed lands, whether public or private. See 133 U.S. at 326-31. Under that ancient custom, the Court determined, sheepmen were entitled to trail their stock across unenclosed private, checkerboard lands.[40] The Court's recognition of such a custom certainly does not indicate any view that Congress intended to reserve a very different right of access in making the Union Pacific grant. In short, *Buford*—like *Camfield* and the Unlawful Inclosures Act—affords no basis for inferring the existence of con-

[39] If public rights-of-way had been reserved from Congress' grants, the private owners obviously would not have been entitled to enclose their own lands "regardless of any detriment" to others.

[40] See also *Lazarus* v. *Phelps,* 152 U.S. 81, 84-85 (1894) (*Buford* recognized the "custom of permitting cattle to run at large without responsibility for their straying upon the lands of others . . . .").

gressionally reserved rights-of-way that the decision nowhere considered or discussed.[41]

IV. The Decision Below Affords No Basis for Defining the Limits of Any Reservation for Rights-of-Way.

The unsettling effect of the decision below is compounded by the fact that the scope of the reserved rights-of-way it announces is uncertain and potentially unascertainable. Unlike the common law easement of necessity, which has been found inapplicable in this case,[42] a public easement derived solely from an unexpressed congressional intent could be subject to widely varying constructions, both from court to court and from one tract to another.

Common law ways of necessity are implied as a matter of law in favor of landlocked parcels of private

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[41] *Mackay* v. *Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), upon which the Court of Appeals also relied (Pet. App. xiv-xvi), was decided on the basis of *Buford* (see *id.* at 120) and likewise is without relevance for the question whether Congress intended to reserve any rights-of-way across the lands granted in the Union Pacific Act.

[42] The trial court found no common law easement of necessity "in favor of the United States because the sovereign power of eminent domain permits the United States to condemn such rights of way as may be reasonably required for access to any public lands." Pet. App. v; accord, *e.g.*, *Simonson* v. *McDonald*, 311 P.2d 982, 984-86 (Mont. 1957); *Alcorn* v. *Reading*, 66 Utah 509, 243 P. 922, 926 (1926); *State* v. *Black Bros.*, 115 Tex. 615, 297 S.W. 213, 218-19 (1927). See also p. 8 n.6, above. Of course, if a common law easement of necessity could be implied here, such an easement would be strictly limited in accordance with the common law principles described below.

property.[43] Such easements have been narrowly restricted by reference to the necessity from which they arise. The courts have made clear that affected owners and their properties are not to be burdened by such easements any more than is required to permit reasonable access to the landlocked parcels.[44]

On its face, the statutory reservation for a right of public access imputed to Congress by the Court of Appeals is not so clearly limited. It is defined exclusively by a supposed congressional intent of which there is no tangible evidence and which may be as elastic as a court's conception of what might have been conducive

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[43] See, *e.g.*, *United States* v. *Rindge*, 208 F. 617, 620 (S.D. Cal. 1913); *Westminster Investing Corp.* v. *Kass*, 266 F. Supp. 597, 599-600 (D.D.C. 1967). See generally *Restatement of Property* §§ 474-76 (1944).

[44] The holder of a common law way of necessity is restricted to reasonable use of the way for the purposes of going to and from his own property. See, *e.g.*, *Holman* v. *Patterson*, 34 Tex. Civ. App. 344, 78 S.W. 989-991 (1904). See also 2 G. Thompson, *Real Property* § 386, at 565-66 (1961). The holder may not expand his use to impose any undue additional burden on the affected property, see, *e.g.*, *Murphy* v. *Mart Realty of Brockton, Inc.*, 348 Mass. 675, 205 N.E.2d 222, 225 (1965); on the contrary, he is required to use the "way in such manner as to avoid unnecessary inconvenience to the owner of the [burdened] estate," see, *e.g.*, *City of Whitwell* v. *White*, 529, S.W.2d 228, 235 (Tenn. Ct. App. 1974). See also *Fleishon* v. *Philadelphia Zoning Bd.*, 385 Pa. 295, 122 A.2d 673, 674-75 (1956); 2 G. Thompson, *Real Property* § 386 (1961). Moreover, such common law ways are located so as to encroach on the affected property no further than necessary to provide the holder with reasonable access to his parcel. See, *e.g.*, *Morgan* v. *Culpepper*, 324 So. 2d 598, 605-06 (La. Ct. App. 1975), *aff'd*, 326 So.2d 377 (La. 1976). See also II *American Law of Property* § 8.66, at 278 (A. Casner ed. 1952). Indeed, the common law normally allows the burdened owner to designate a reasonable route for the way across his lands. See II *American Law of Property* § 8.66, at 278 (A. Casner ed. 1952).

to the development of the West. Such amorphous roots give no reliable guide as to the extent of the burden that the reservation will be held to permit.

Thus, if the decision below should stand, the present owners of granted lands face the prospect of highly intrusive claims to access across their property, depending on the uses to which the Government puts adjacent public lands and the nature and number of the interested public. A limited right-of-way across the corner of a granted section might itself depreciate the value of the land significantly. But a crowded superhighway through the heart of the section could make the land unusable for some purposes and could greatly impair its worth for others.

To create a cloud on titles of such indefinite scope is antithetical to traditional notions of sound property law. Such an indefinite cloud is the inevitable consequence of a statutory construction that implies unexpressed reservations from nothing more than a court's own conception of sound policy. That consequence provides yet another reason in addition to those already discussed above why judicial implication of unexpressed reservations in the land-grant acts should not be allowed. Moreover, if this Court should somehow conclude that some reservation for rights-of-way is implied in the Union Pacific Act, notwithstanding the lack of any supporting evidence or authority, it should at least make clear that any such rights must be limited by principles of minimum intrusiveness such as those applicable to common law easements.[48] And it should

[48] In its reply brief (p. 4) before the Court of Appeals, the United States indicated that it was asserting only a public "right of access over the common interlocking section corners" of the granted odd-numbered sections. While the Court of Appeals concluded that Congress had intended to reserve an easement for access, it did not attempt to define the scope or location of that easement.

confirm that any implied rights of access across granted lands in the checkerboard are reciprocally available to private owners seeking access to their own lands across the public sections. An imputed congressional intent to reserve must be accompanied by an imputed intent to act reasonably and evenhandedly, as well as to minimize the potential for uncertainty and hardship.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed.

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November 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1686

LEO SHEEP COMPANY AND PALM LIVESTOCK COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR, AND DIRECTOR, BUREAU OF LAND MANAGEMENT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of Energy Transportation Systems Inc. as Amicus Curiae in Support of Respondents

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Amicus has received and filed with the Clerk of the Court letters from counsel for Petitioners and Respondents consenting to the filing of this Brief in Support of Respondents.

OPINIONS BELOW

The opinions below are listed in and appended to the petition for writ of certiorari.

QUESTION PRESENTED

Section 2 of the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, created and granted to the Union Pacific Railroad Company a rail-

road right of way. Sections 3 and 4 of said act as amended granted certain odd numbered sections of land, including land now owned by petitioners, to said company to aid in the construction of the railroad. The question presented is whether the grant under Sections 3 and 4 must be deemed to have been made subject to implied easements necessary for access to adjacent even numbered sections of land.

STATUTES INVOLVED

The statutes involved[1] are the Homestead Act of May 20, 1862, 12 Stat. 392, ("the Homestead Act") which is set forth in the Appendix hereto, and the Act of July 1, 1862, ch. 120, sections 3 and 4, 12 Stat. 489, 492, as amended by Act of July 2, 1864, ch. 216; Section 4, 13 Stat. 356, 358, ("the Union Pacific Act") which are appended to the petition for writ of certiorari.

INTEREST OF AMICUS CURIAE

Energy Transportation System Inc., (ETSI), plans to construct a coal slurry pipeline for transportation of coal from the newly developed coal fields of northeastern Wyoming through the States of Nebraska, Kansas, Oklahoma, Arkansas, and on to Louisiana, which will cost approximately $1.5 billion dollars.

In furtherance of its corporate purpose, ETSI has been for several years and is now engaged in acquistion of its right of way to construct the pipeline. Such right of way consists of a chain of subsurface easements for the installation and operation of the pipeline.

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1. In the view of amicus, the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-1066, is not involved because it is clear from the record that no inclosures, unlawful or otherwise, were constructed.

While the nation's railroads have no objection to more than 1,700 pipelines transporting petroleum products and chemicals under their railroad lines in the subsurface strata of the right of way, such crossings by the ETSI coal slurry pipeline have been opposed by all railroads from Wyoming to Louisiana in both the political arena and the courts. ETSI's coal slurry pipeline must cross under the tracks of numerous railroads, including the Union Pacific Railroad Company ("Union Pacific"). Pipeline crossing permits are commonly issued by Union Pacific to other types of pipelines; the construction and operation of pipelines in no way interferes with railroad operations. Union Pacific has consistently refused to issue to ETSI crossing permits allowing the coal slurry pipeline to be constructed and operated beneath the railroad tracks. In view of this refusal, ETSI has been forced to obtain the necessary crossing easements from adjacent landowners in areas where the Union Pacific does not own the substrata under the railroad right of way.

For the same reason, ETSI has been forced to litigate the question of the validity of its easements with Union Pacific, because judicial confirmation of its title is necessary to ensure the viability of the pipeline project.[2]

Four cases are pending between ETSI and the Union Pacific in the federal courts. Three of these are on appeal to the Court of Appeals for the Tenth Circuit, following judgment in favor of ETSI. *Energy Transportation Systems Inc. vs. Union Pacific Railroad Company,* Case No. 77-1770 (appeal from the United States District Court for the District of Wyoming): *Energy Transportation Systems Inc. vs. Union Pacific Railroad Company,* Cases Nos. 78-1680 and 78-1681 (consolidated appeals from the United

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2. Judgment in favor of ETSI has been entered and has become final in 60 lawsuits filed by ETSI against railroads including the Union Pacific to quiet title to ETSI's pipeline easements.

States District Court for the District of Kansas). In the United States District Court for the District of Nebraska, decision is pending on motions by all parties for summary judgment in *Energy Transportation Systems Inc. and Board of Educational Lands vs. Union Pacific Railroad Company*, Case No. CV 77-L-167.

In two of these cases (originating in Wyoming and Nebraska), ETSI's easements were obtained from predecessors in title to even numbered sections of land adjacent to the railroad.[3] At issue in those cases is the nature of the right of way conveyed to Union Pacific by Section 2 of the Union Pacific Act.

The other two cases (originating in Kansas) involve situations where ETSI's easements were conveyed by successors in title to land in odd numbered sections originally granted to the Union Pacific pursuant to Sections 3 and 4 of the same Union Pacific Act. Hence the rights granted by Sections 3 and 4 are at issue in the Kansas cases.

The case at bench involves the construction of the same Union Pacific Act. The success of ETSI's $1.5 billion project depends upon the above-mentioned cases pending in the lower courts; hence, ETSI's interest in the outcome probably exceeds that of either petitioners or respondents.

Petitioners acknowledge in their brief (Brief of Petitioners, p. 4) that, because they do not own or occupy any part of the right of way granted by the Union Pacific Act, the character of rights granted or reserved therein is not at issue in this case. However, petitioners then proceed to argue that there is no express reservation of any right

3. In the Nebraska case, ETSI's easement was granted by the State Board of Educational Lands and Funds, which holds the fee in the even numbered section involved pursuant to the Act of May 30, 1854, 10 Stat. 277, the Nebraska Territorial Act, and the Act of April 19, 1864, 13 Stat. 47, the Nebraska Statehood Act.

of way in the Union Pacific Act across lands granted under Section 3 of the Act to the railroad. This position is supported by the three railroad amici, which go on to urge that the Union Pacific Act granted "unqualified and absolute title" to the Section 3 lands (Brief of amici Union Pacific et al., p. 10).

The interests of Amicus, noted above involve both Section 2 and also Sections 3 and 4 of the Union Pacific Act. This case involves only Sections 3 and 4, but those sections must be considered in light of Section 2, the balance of the Union Pacific Act, and also the contemporaneous Homestead Act. These matters have not been briefed by the parties or other amici. ETSI wishes to bring to the attention of the Court that for over a century courts have been defining the extent and character of estates in and to the lands granted in the forty mile corridor of the Union Pacific railroad line, including both the even numbered and odd numbered sections, and also the right of way, and that the decisions support Respondents' position that the Union Pacific did not receive "unqualified and absolute title" under the Union Pacific Act.[4]

STATEMENT OF THE CASE

Amicus adopts Respondents' Statement of the Case as set forth in the Brief of Respondents in Opposition (pp. 2-4) with the proviso that all references to old numbered sections of land "which were originally granted by Congress to the Union Pacific Railroad in 1862" should specify that such sections were granted by Sections 3 and 4 of the Union Pacific Act.

4. The most recent decisions are the ETSI cases. *Energy Transp. Systems Inc. v. Union Pac. R.R. Co.*, 456 F.Supp. 154 (D.Kan. 1978); *Energy Transp. Systems Inc. v. Union Pac. R.R. Co.*, 453 F.Supp. 313 (D.Wyo. 1977).

SUMMARY OF ARGUMENT

The Homestead Act and the Union Pacific Act were two of many Congressional enactments passed during the 1860s to promote and facilitate the settlement of the West. During the same decade, eight other railroad acts were passed,[5] the Oregon Trail was subsidized by land grants (Act of July 4, 1866, 14 Stat. 86), and immigration to the West was encouraged by all means at the Government's disposal, for purposes of settlement. The Homestead Act opened all "public lands" to "any person" who chose to enter and reside thereon for purposes of "cultivation and settlement." After the specified period, entrymen under the Homestead Act received fee simple title to the land and the substrata, including mineral rights, pursuant to patents issued by the United States.

The Union Pacific Act created *defeasible* real property interests which would further the two purposes of the Act. Those purposes were the construction of railroad from the Missouri River to the Sacramento River, and the opening to settlement and development of the lands made accessible by the railroad.

Accordingly, Section 2 of the Act granted "the right of way through the public lands" of a specific width and with necessary space for depots and other facilities. This grant was conditioned upon its use for railroad purposes only, and when such use terminated the land reverted to the United States. Thus the Section 2 right of way was inalienable, and no purpose would have been served by the attachment of the servient estate to the right of way. To hold

5. Act of March 3, 1863, 12 Stat. 772; Act of May 5, 1964, 13 Stat. 64; Act of May 12, 1864, 13 Stat. 72; Act of July 2, 1864, 13 Stat. 356; Act of July 4, 1866, 14 Stat. 87; Act of July 23, 1866, 14 Stat. 210; Act of July 25, 1866, 14 Stat. 239; Act of July 27, 1866, 14 Stat. 292.

otherwise would create a long narrow strip of land of little value, which would have impeded rather than promoted development contrary to the Congressional objective of opening the lands to settlement. Therefore, the right of way included the right to use such portion of the subsurface as was necessary for railroading purposes, but nothing further. No patents were ever issued to the right of way. The right of way granted by Section 2 passed through both even and odd numbered sections. The land in the even numbered sections was largely settled pursuant to the Homestead Act and the land in the odd numbered sections was granted to the Union Pacific by Section 3 of the Union Pacific Act. The owners of the servient estate retained the right to cross under and through the right of way in any manner which did not prevent the use of the right of way for railroad purposes.

Under Section 3, the Union Pacific received a grant of "every alternate section of public land, designated by odd numbers" within specified limits on either side of the "road," for the purpose of "aiding in the construction of the railroad." These grants were also conditional in many respects. First, the grant lands were subject to the right of way created by Section 2. Title did not pass under Section 3 until the "line of said road is definitely fixed." Section 3 required that the lands be sold or disposed of within three years of the completion of the railroad; otherwise they became subject to preemption and settlement in precisely the same manner as the adjacent even numbered sections. This conditional defeasance of the grant was imposed because Congress intended that the lands be sold or otherwise disposed of to "aid in the construction" of the

railroad by providing funds, *and* because Congress desired that the lands be open to public settlement.[6]

Section 6 of the Union Pacific Act provided that the lands were subject to forfeiture in the hands of the railroad if the railroad failed to repay subsidy bonds received pursuant to Section 5 of the Act, or if the railroad at any time failed to keep the road in repair and use, or to transmit telegrams, or to transport mail, troops and munitions.

Section 4 of the Act provided that patents would not be issued to the odd numbered sections until the adjacent forty miles of railroad (reduced to twenty by the 1864 amendment) were actually constructed.

The railroads' assertion that "on its face the Act gave unqualified and absolute title to the granted lands" (Brief of Amici Union Pacific et al, p. 10) is unsupportable.[7] The granted lands were on the contrary subject to defeasance on numerous contingencies—all to ensure that the dual goals of the Act were attained. The Congressional aim obviously was to ensure construction and operation of the railroad, not to confer a bonanza upon the promoters.

Since the main purpose of the Section 3 grant was to enable and require the railroad to sell the lands, Congress must have intended that marketable title would pass to the vendees of the Section 3 lands. It follows that the vendees

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6. Congress underestimated the value of the lands granted by Section 3; otherwise it would not have been possible for the railroad to convey vast tracts to wholly owned subsidiaries, such as amicus Union Pacific and still construct the railroad. The question of whether such conveyances were effective to avoid the defeasance imposed by Section 3 is beyond the scope of this brief. It is sufficient to note that Congress terminated the land grant system entirely as soon as the results became apparent. See Cong.Globe, 42d Congress, 2d Sess. 1585 (1872), noting disapproval of the land grants.

7. See text following note 21, infra.

would receive the servient estate under the right of way in those areas where the railroad line passed over odd numbered sections, subject to the right of way granted by Section 2. Patentees under the Homestead Act received the same rights in even-numbered sections.

The narrow question in the instant case is whether reasonable surface rights of passage across the section corners of private lands were impliedly reserved by the Union Pacific Act where and for so long as necessary for access to the public domain. If the vendees of the railroad were to take marketable title, as Congress clearly intended, they must have received an implied right of access *to the odd numbered sections* for such period of time as no other means of access existed, e.g., until the construction of public roads. This is true because the Homestead Act contemplated that *the even numbered sections would become private land*, as indeed great portions of them have. Where necessary, access to the odd numbered sections must exist as matter of law, uncomplicated by questions of federal policy in allowing crossing of the public domain. By the same token, the odd numbered sections were granted subject to the reciprocal implied right of passage for access to the even numbered sections. Cases in point have uniformly so held.

ARGUMENT

A. Section 2 of the Union Pacific Act Expressly Granted and Reserved a Right of Way Easement Through the Public Lands for the Construction and Operation of the Railroad.

The Union Pacific Act of 1862 must be interpreted in light of its background and purpose. Congressional grants of rights of way for public transportation have been made from the earliest days of the Republic. See generally, P. Gates, *History of Public Land Law Development* (1968) pp. 341-356. In modern times, government has more often ac-

quired, rather than granted rights of passage for the public. In all cases, the general rule is that a way of passage granted or reserved is an easement for the use of the surface of land, and such subsurface use as may be necessary to effectuate the purpose of the easement, e.g., support for the piers of a bridge. *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942); *Himonas v. Denver & R.G.R. Co.*, 179 F.2d 171 (10th Cir. 1949).

For a brief period in our history, such Congressional grants were accompanied by a *separate* grant of certain portions of public land adjacent to the road, canal, or right of way. This practice began in 1823 (Act of February 28, 1823, 3 Stat. 727, Ch. 3) and was first extended to railroads in 1850. Act of September 20, 1850, 9 Stat. 466. During the Civil War, the practice was followed in several railroad acts, including the one at issue here. The last such grant was the Act of March 3, 1871, 16 Stat. 573. By 1872, the House of Representatives resolved that land grants in support of railroads should be discontinued because the public domain should be conveyed to settlers rather than corporations. Cong. Globe, 42d Cong., 2d Sess. 1585 (1872). In 1875, the granting of railroad rights of way without land grants was made an administrative function. Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939, repealed, P.L. 94-579, 90 Stat. 2793. Rights of way granted under the latter act have been uniformly held to be easements. *Great Northern Ry. Co. v. United States*, supra.

There is no logical reason to conclude that railroad rights of way granted during the twenty-one years when land grants were also made should have been any different than similar rights of way granted before or after that period.

The granting clause of Section 2 of the Union Pacific Act of 1862 is identical to that of the Act of 1875 ("The right of way through the public lands . . . is granted"), which this Court has construed as granting an easement

only. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), this Court held that the United States, owner of the land over which the right of way crossed, was the owner of the substrata underlying the right of way, and that the right of way was a mere easement, not a fee. No reason is apparent for a different construction of Section 2 of the Union Pacific Act.[8]

The balance of the Union Pacific Act reinforces this conclusion. Section 4 provides that patents should issue to the land grant lands conveyed by Section 3 "conveying the right and title to said lands to said company on each side of the road." Patents were issued upon completion of the adjacent railroad in forty mile segments (amended to twenty miles by the Act of 1864). Patents to the granted lands were directed to be issued in November, 1874 (see *Platt v. Union Pacific R. R. Co.*, 99 U.S. 48, 56 (1878)), and were subsequently issued. *No patent was ever issued for the right-of-way easement;* only the lands granted by Section 3 were patented pursuant to Section 4. Both the language of the Act and its administrative construction by the Department of the Interior in issuing the patents indicate that Section 2 conveyed only an easement.[9]

Congress has confirmed that the Section 2 right of way is not a fee. The railroad had purported to make conveyances of Section 2 lands to innocent third parties in the latter half of the nineteenth century. Following the decision in *North-*

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8. Cf. *United States v. Denver & R.G. Ry.* 150 U.S. 1 (1893), in which this Court compared the purpose of the Act of 1875 and the special act passed to promote the construction at the Denver and Rio Grande Railroad (Act of June 8, 1872, 17 Stat. 339, c. 354), and concluded that "The general and special acts are in no way inconsistent with each other." 150 U.S. at 8.

9. A typical patent to the Section 3 land provided that that "the United States of America . . . do give and grant unto the said Union Pacific Railway Company, and its assigns, the tracts of land . . ." listed therein. Only "mineral lands" were excepted, and the existence of the Section 2 right of way crossing the granted lands is not even mentioned. See patent To Southeast Quarter of

ern Pacific Ry. v. Townsend, 190 U.S. 267 (1903), the Union Pacific attempted to disavow these conveyances. To protect the grantees and their successors, Congress passed the Norris Act, 37 Stat. 138, in 1912, "legalizing" the prior conveyances "to the extent . . [such conveyances] . . . would have been legal or valid *if the land involved therein had been held by the* [*railroad*] . . . *under absolute or fee simple title*" (emphasis added). One cannot ignore this Congressional declaration that the right of way is not and never has been a fee interest.

By the Act of March 8, 1922, 42 Stat. 414, 43 U.S.C. § 912, Congress granted its reversionary interest in *all* rights of way to the owners of the servient estate. "Whenever public lands . . . have been . . . granted to *any* railroad . . . for use as a right of way . . . and use and occupancy of said lands for such purposes has ceased . . . all right, title, interest and estate of the United States in said lands . . . shall . . . be transferred to [the owner] of the legal subdivision traversed . . ." (emphasis added) This is a Congressional declaration that all grants of right of way were for use and occupancy only, and that the Union Pacific right of way is no different than any other right of way.

The Section 2 easement has never been treated as having the characteristics of a fee interest. Only fourteen years after passage of the Act, this Court noted that

> "It may be conceded that a *railroad company has not power either to sell* or mortgage its franchise, or perhaps *the road which it has been chartered to build,*

Section 3, Township 11, Range 29, Gove County, Kansas dated February 25, 1897, and recorded in the office of the Register of Deeds of Gove County, Kansas on May 13, 1897 in Book 14, Pages 104 to 113. Nor did patents issued to entrymen under the Homestead Act make any mention of the Section 2 right of way. See patent to the North One Half of Section 2, Township 14, Range 64, Laramie County, Wyoming dated March 29, 1913, recorded in the office of the Register of Deeds, Laramie County, Wyoming on May 22, 1913, in Book 170, Page 155.

> without express legislative authority, and this has in some cases been decided. The reason is that such a sale or mortgage tends to defeat the purpose the legislature had in view of the grant of the charter." (emphasis added)
>
> *Platt v. Union Pacific R. R. Co.,* [10] supra, at 57.

Subsequent decisions affirmed that the right of way, being inalienable, was not subject to adverse possession, and was subject to reversion to the government in the event it ceased to be used or held for use for railroad purposes. *Northern Pacific Ry. v. Townsend,* 190 U.S. 267 (1903).[11]

Since the right of way is inalienable and thus lacks the most basic attribute of a fee, no purpose would have been served by Congress granting other attributes of fee ownership, such as an interest in the subsurface under the long narrow right of way created by Section 2. See *Himonas v. Denver & R. G. W. R. Co.,* 179 F.2d 171 (10th Cir. 1949) ("The purpose of the grant was to encourage, not impede the development of the areas along the right of way.") Congress intended that both the odd numbered and even numbered sections be developed and settled. Therefore, a logical interpretation of the Act must conclude that the substrata under the right of way is appurtenant to the

10. The Court held that the railroad could sell or mortgage land grant lands, such action being the express purpose of Section 3 of the 1862 Act.

11. At the time of the *Townsend* decision the concept of a non-appurtenant easement was not known, hence the court referred to the estate it was describing as a "limited fee." This phrase was the source of much controversy, until 1957. In that year, this Court clarified that the "limited fee" was in effect an easement and that "[t]he most that the 'limited fee' cases decided was that the railroad received [under Section 2] all surface rights to the right of way and all rights incident to the use for railroad purposes." *United States v. Union Pacific R. Co.,* 353 U.S. 112 (1957).

servient fee through which the right of way passes.[12] The Union Pacific itself acquiesced in this conclusion for some ninety years. In *United States v. Union Pacific Railroad Co.*, 353 U.S. 112 (1957), Record on Appeal Vol. III, p. 37, counsel for the railroad advised the court that:

> "We are now claiming *for the first time* that the right of way includes greater rights than those required for railroad purposes." (emphasis added)

This Court found the claim wanting:

> "We would have to forget history and read legislation with a jaundiced eye to hold that when Congress granted *only a right of way* and reserved all "mineral interests" it nonetheless endowed the railroad with the untold riches underlying the right of way." (emphasis added)
>
> 353 U.S. at 116

Amicus submits that this Court settled the dispute about the nature of the interest created by Section 2 of the Union Pacific Act in 1957. However, in litigation between Amicus and Union Pacific, the railroad has relied upon a dictum in *Great Northern Ry. Co. v. United States, supra.* In that 1942 case, this Court held that granting language in the 1875 right-of-way statute (identical to Section 2 of the 1862 Act) created an easement. In dealing with the argument that the "limited fee" cases compelled a different conclusion, the Court observed that:

> "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same Act."
>
> 315 U.S. at 278

12. A contrary conclusion would frustrate the purpose of Section 3. See text following note 26, infra.

This passage was unnecessary to the decision and deals with a subject, Section 2 of the 1862 Act, with which the Court did not come to grips until 1957. *United States v. Union Pacific Ry. Co.*, supra, concluding that the "limited fee" cases involved only surface rights. In the latter case this Court noted that it did not consider the question of subsurface rights under Section 2 of the Act of 1862 in *Great Northern.* 353 U.S. at 119.[13]

B. Patentees Under the Homestead Act Received a Fee Simple Absolute Including Mineral Rights Subject Only to Statutory Reservation of the Railroad Easement Granted by Section 2 of the Union Pacific Act.

The Homestead Act of 1862 was the first major opening of the public domain to private acquisition and ownership. It provided that "any person" could enter public lands for the purpose of "cultivation and settlement," and after living on the land for five years (later reduced to three years), could obtain a patent to the land so occupied. The purpose of the Act was nothing less than to people the land with citizens.

In the words of this Court:

> "The policy of the Homestead Act . . . looks to a holding for a term of years by an actual settler with a view of acquiring a home for himself. In encouragement of such settlers and none others homesteads have been freely granted by the government."
>
> *Adams v. Church,* 193 U.S. 510 (1904)

13. In any event, the passage is reconcilable with *United States v. Union Pacific Ry. Co.*, supra, and with the position of amicus. Upon analysis, it is clear that the railroad did own the substrata under the right of way in odd numbered sections by reason of the grant in Section 3 of the 1862 Act. Read in this light, *Great Northern* is entirely consistent with the subsequent holding of this Court and with the position of amicus that the grant of Section 2 of the 1862 Act created only an easement.

Settlement was a primary goal of Congressional policy toward the western lands. The various railroads authorized during the 1860s, including the Union Pacific, were simply means to that end. This appears from this Court's contemporaneous assessment of the Union Pacific Act in *United States v. Union Pacific R. Co.*, 91 U.S. 72 (1875):

> "Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast *unpeopled* territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, *settlements made where settlements were possible and thereby the wealth and power of the United States largely increased . . .*" (emphasis added)
>
> 91 U.S. at 80

The Court of Appeals drew the same conclusion in the instant case:

> "It was Congress' intent that lands granted, and certainly lands retained, would eventually be conveyed to private persons who would develop the land and *incidentally* patronize the railroad." (emphasis added)
>
> 510 F.2d at 885

It is against this background that the property rights conferred by the Homestead Act and the Union Pacific Act must be assessed.[14] Congress was intent upon peopling the

14. The Homestead Act was repealed by the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2793, because it had served its purpose; no appreciable agricultural public land was left in the lower forty-eight states. The Act remains in effect as to Alaska until 1986.

land with settlers, not with conferring a bonanza on the railroad promoters.

The grants made under the Homestead Act clearly had equal or greater dignity than the rights accorded the railroad corporation. For example, entry on land pursuant to the Homestead Act removed the entered lands from the public domain for the duration of the entry. *Hasting R. Co. v. Whitney*, 132 U.S. 357 (1889).

Section 3 of the Union Pacific Act excluded from the grant to the railroad any lands to which a preemption or homestead claim had attached. Moreover, a valid entry of an odd numbered section within the railroad grant limits before final location of the line gave the entryman a title superior to the railroad. *Nelson v. Northern Pacific Ry. Co.*, 188 U.S. 108 (1902); *Svor v. Morris*, 227 U.S. 524 (1913).

Nelson v. Northern Pacific Ry. Co., supra, is particularly pertinent because it involved the Act of July 2, 1864, 13 Stat. 365, part of the same act which amended the Union Pacific Act. The Northern Pacific and Union Pacific grants were virtually identical. In holding for the entryman, this Court reviewed numerous decisions upholding the rights of settlers against the railroads, and had this to say about the competing interests of the individual claimants and the railroad corporation:

> ". . . [I]t was deemed important to encourage the settlement of the country along the proposed [railroad] route. . . . Congress knew that if immigrants accepted the invitation of the Government to establish homes upon the unsurveyed public lands, they would do so in the belief that . . . their occupancy would be respected, and that they would be given an opportunity to perfect their titles in accordance with the homestead laws.

Such was the situation when the Act of July 2, 1864 was passed. Necessarily the act must be interpreted in the light of that situation. It should not be so interpreted as to justify the charge that the Government laid a trap for honest immigrants who risked the dangers of a wild, unexplored country, in order that they might establish homes for themselves and their families. And it should not be supposed that Congress had in view only the interests of the company, which, with the aid of munificent grants of lands, was empowered to connect Lake Superior and Puget Sound with a railroad and telegraph line."

188 U.S. at 113-114[15]

The Homestead Act patentees received the servient fee interest in even numbered sections under the right of way created by Section 2 of the Union Pacific Act and similar statutes. The early homestead patents contained no reservation of subsurface rights. Reservation of mineral rights *as against homesteaders*[16] did not begin to be federal policy until after the turn of the century.[17]

The Act of March 3, 1909, 35 Stat. 844, first provided for the reservation of coal rights from Homestead Act patents. The Surface Patent Act of 1914, 38 Stat. 509, expanded this policy to all non-metallic minerals, and the Stock-Raising Homestead Act of 1916, 39 Stat. 862, provided for the

15. The Court also found the same policy reflected in the statutory relation back rule of the Act of May 14, 1880, 21 Stat. 140.

16. In distinction, Section 3 of the Union Pacific Act excluded all mineral lands from the operation of the Act. The exclusion applies to the right of way. *United States v. Union Pacific Railroad Co.*, 353 U.S. 112 (1957).

17. With the advent of irrigation, the Act of August 30, 1890, 26 Stat. 391, codified as 45 U.S.C. §§ 945-950, provided that subsequent patents should be subject to rights of way for ditches and canals.

reservation of all minerals. Subsequently, development of the reserved rights was addressed by the Mineral Leasing Act of 1920, 41 Stat. 437.

Prior to the reservation policy which began in 1909, patentees received all rights which the government had, including mineral rights. *Longdeau v. Hanes,* 21 Wall. 521 (1874). Even after the 1909 and 1916 Acts became law, a patent issued to a homesteader without an express reservation of minerals operated to convey mineral rights. *United States v. Price,* 111 F.2d 206 (10th Cir 1940). Since the railroad received no mineral rights under Section 2 of the Union Pacific Act (*United States v. Union Pacific Railroad Co.,* 353 U.S. 112 (1957)) patentees under the Homestead Act received mineral rights whether their entry and patent dated before or after the location of the Section 2 right of way.

In *Northern Pacific Railway Co. v. United States,* 277 F.2d 615 (10th Cir. 1960), it was held that a patent to land adjacent to a canal right of way created by the Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 945, carried with it the servient estate under the canal right of way including mineral rights. The statute created a "right of way" for ditches and canals, just as Section 2 of the Union Pacific Act creates a "right of way" for the railroad. The general rule that the servient estate under a railroad or other right of way follows the adjacent fee applies to both statutes. See *United States v. Magnolia Petroleum Co.,* 110 F.2d 212 (10th Cir. 1939).[18]

It must be acknowledged that the patentee's rights were subject to the Section 2 right of way in areas where the right of way crossed homesteaded lands. This is why Sec-

18. The same is true of the lands granted by Section 3. See text following note 26, infra.

tion 2 of the Union Pacific Act, unlike Section 3, applies to all public lands, whether or not subject to preemption or homestead claims.[19]

However, it is equally clear that the Section 2 right of way may be crossed by the patentee as necessary for the development and enjoyment of the patented lands (provided such crossing does not interfere with railroad operations). Such is the import of *Northern Pacific R. Co. v. Townsend*, 190 U.S. 267 (1903) and *Himonas v. Denver & R.G.W. R. Co.*, 179 F.2d 171 (10th Cir. 1949).

Hence the patentee is subject only to the right of way grant, and then only to the extent necessary to avoid interference with railroad operations. See *Kansas City Southern Ry. Co. v. Arkansas-Louisiana Gas Co.*, 476 F.2d 829 (10th Cir. 1973).[20]

C. Sections 3 and 4 of the Union Pacific Act as Amended Granted a Conditional Fee Subject to Construction, Completion and Operation of the Railroad, Payment of Subsidy Bonds and the Expressly Reserved Right of Way Easement Created by Section 2 of Said Act and Subject to the Requirement That the Railroad Sell or Otherwise Dispose of the Lands Granted (Including Mineral Rights).

1. THE UNION PACIFIC NEVER HELD UNQUALIFIED OR ABSOLUTE TITLE TO THE SECTION 3 LANDS.

Much confusion has arisen from sweeping statements to the effect that the Union Pacific received "unqualified absolute title" to lands granted under Section 3 of the 1862 Act.[21]

19. If the claim had been perfected, the lands ceased to be public, effective as of the date of entry, and hence could not be burdened by the right of way. See *Christie v. Great Northern Ry. Co.*, 284 Fed. 702 (C.C. Wash. 1922).

20. The decision of the Court of Appeals in the case at bench impliedly recognizes that the right of way, like Section 3 lands, is subject to crossing for access, and this conclusion is correct. In *Northern Pacific R. Co. v. Townsend*, 190 U.S. 267, 272, this Court noted that "Congress must have assumed . . . that . . . as settlements were made, crossing of the right of way would become necessary . . ."

Amici Union Pacific et al. would have the Court believe that "on its face, the Act gave unqualified and absolute title to the granted lands." (Brief of Amici Union Pacific et al. p. 10). This is incorrect. Congress did not make a simple donative conveyance for the benefit of the railroad promoters. On the contrary, the Section 3 grant on its face was carefully conditioned and made defeasible in certain eventualities, to effectuate the purposes of the Act. Those purposes were to ensure the construction and operation of the railroad and the settlement of the lands so made accessible.

Section 3 granted "for the purpose of aiding in construction of said railroad . . . every alternate section of public land, designated by odd numbers" within specified distances from the road. The purpose of the grant was to enable the railroad to *sell* the lands in order to raise funds for construction. The title was made defeasible if the lands were not sold. Section 3 goes on to provide:

> "And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed shall be subject to preemption and settlement, *like other lands*, at a price not exceeding one dollar and twenty-five cents per acre, payable to said company." (emphasis added)

Two points should be made here. First, this condition did not attach to the right of way granted by Section 2, which was subject to defeasance (reverter) only in the

21. Some of this difficulty may be attributable to the dictum in *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942) which made reference to "outright grants" to the railroads. See text at Note 13, supra.

event of abandonment.[22] Secondly, the "other lands" also subject to settlement and preemption are the *even numbered sections* opened to the public by the Homestead Act. This is important because it evidences the intent of Congress to open *all* of the west to settlement, while allowing the odd numbered sections to pass through the hands of the railroad in order to finance its construction. Congress did not anticipate the ingenuity of the railroad which would allow it to retain hundreds of thousands of acres of Section 3 lands (Brief of amici Union Pacific et al. in Support of Petition, p. 5).

This Court was forced to deal with a conflict between the two goals of the Act in 1878, four years after the railroad was completed. In *Platt v. Union Pacific R.R. Co.,* 99 U.S. 48 (1878), the words "disposed of" were construed to encompass hypothecation. The case was a difficult one. Platt, a would-be homesteader, had entered and improved an odd numbered section in 1874, (after the location and construction of the railroad) and attempted to preempt the land in 1878. The railroad had never made any use of the land except to subject it, along with thousands of other acres, to the general mortgage required by the 1864 amendment. The United States intervened in favor of Platt, and three justices dissented, feeling that the land should have been freed from the railroad's grasp. The majority opinion discusses the nature and purpose of the Section 3 grant, and of the goals of the Act:

> "Suffice it to say, the purpose of Congress . . . was to obtain the construction of the railroad. For that alone the subsidy bonds were given. *Only for that the grants of land were made....*"

22. See text preceeding Note 10, supra. The government's right of reverter in abandoned railroad right of way was transferred to the owner of the servient estate by the Act of March 8, 1922, Ch. 94, 42 Stat. 414, 43 U.S.C. § 912.)

> "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. . . . The unforeseen success of the enterprise and the unprecedented rush of emigration along the line of the railroad *have shed new light upon the value of the grants made to the company.* But in endeavoring to ascertain what the Congress in 1862 intended, we must . . . place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances . . . We have been led unhesitatingly to the conclusion that the mortgage executed . . . in 1867 was a disposition of the lands granted by the third section of the Act of 1862, within the meaning of that act. . . ."[23]
>
> "The principal objection urged against the interpretation we have given to the words "sold or disposed of" is that it is repugnant to the government policy of guarding against monopolies of public lands by large corporations or single individuals. It must be admitted that Congress had that policy in view when it declared that the lands not sold or disposed of within three years after the entire road should be completed should be subject to settlement and preemption at a price not exceeding $1.25 per acre. But this policy was manifestly subordinated to the higher object of having the road constructed and constructed with the aid of the land grant. . . . It is evident Congress thought there might be remnants of the grant, not used in aid of construction of the road . . . and those remnants it undertook to open to settlement and preemption."
>
> 99 U.S. at 60, 63, 64, 65

23. The court refrained from deciding whether the lands would become subject to preemption again when the mortgage was retired.

Thus it is apparent that the defeasance with respect to preemption was attached to Section 3 because of the second objective of the Act; settlement of all of the public lands.

Other conditions attached to the grant under Section 3 of the 1862 Act. To begin with, it was burdened by the right of way created by Section 2 of the Act wherever the right of way crossed an odd numbered section.[24]

It has been uniformly held that title did not pass under Section 3 until the route map locating the right of way was filed with the appropriate authorities. See, e.g., *Nelson v. Northern Pacific Ry. Co.*, 188 U.S. 108 (1902); *H.A. & L.D. Holland Co. v. Northern Pacific Ry. Co.*, 214 Fed. 920 (9th Cir., 1914).

Section 5 of the Act provides that the granted lands *remaining in the hands of the railroad* were subject to *forfeiture* to the government in the event of nonredemption of the subsidy bonds authorized by that section.

Section 6 of the Act provides that the grant is conditioned upon the construction and use of the railroad for the transportation of troops and munitions and mail; it is implicit that the unsold lands would revert to the government upon failure of the conditions. *United States v. Union Pacific R.R. Co.*, 91 U.S. 72 (1875).

Under Section 17, not only the unsold lands but the railroad itself was to be forfeited to the United States if all construction was not complete within ten years.

Section 4 of the Act provided that patents "conveying the right and title" to the Section 3 lands would be issued to the

24. The right of way itself was subject to crossing when necessary for the use and development of the adjacent lands. See note 20, supra.

railroad only after the adjacent portion of the road was constructed.[25]

Subject as it was to these conditions and restrictions Union Pacific never had "unqualified and absolute title" to the Section 3 lands; it received a conditional fee circumscribed in accordance with the twin goals of the Act, construction of the railroad and settlement of the public lands.

2. THE UNION PACIFIC COULD ALIENATE THE SECTION 3 LANDS, UNLIKE THE SECTION 2 RIGHT OF WAY.

The Section 3 lands were granted to the railroad for sale to raise money for construction. Obviously, the railroad had not only the right but also was under a compulsion to sell or dispose of the lands. Where the right of way crossed the Section 3 lands, the railroad's grantee necessarily took title subject to the right of way for railroading purposes. With the sale, the servient estate under the right of way passed to the grantee (*Chickasha Cotton Oil Company v. Town of Maysville, Oklahoma*, 249 F.2d 542 (10th Cir. 1957); *United States v. Magnolia Petroleum Co.*, 110 F.2d 212 (10th Cir. 1939)), and the railroad retained (as the Act requires) the right of passage, subsurface support and other uses necessary for railroading. *Kansas City So. Ry. Co. v. Arkansas Louisiana Gas Co.*, 476 F.2d 829 (10th Cir. 1973).

In the words of the case last cited:

> ". . . In our opinion [the railroad] cannot deprive the owner of the servient estate . . . from making use of the land in strata below the . . . substrata which are used or needed by the railroad company and which in

25. As we have seen, no patents were ever issued for the Section 2 right of way.

nowise . . . interferes with the construction, maintenance and operation of the railroad."
476 F.2d at 835[26]

This result is required by the Act; if the inalienable right of way were to include subsurface interests or other attributes of a fee, it would be to the detriment of the Section 3 lands, which were to be sold to raise money. Congress could not have intended to create an insurmountable barrier preventing passage over or under the right of way, which would impair the value of the granted lands. Cf. *Mackay v. Uinta Development Co.*, 219 Fed. 116 (8th Cir. 1914). Moreover, any construction of the Union Pacific Act which would result in long, narrow unsalable strips of land owned in fee would produce a result contrary to public policy. Such arguments have been consistently rejected. See, e.g., *United States v. Union Pacific Ry. Co.*, 353 U.S. 112 (1957); *Chicago & N. Ry. Co. v. Continental Oil Co.*, 253 F.2d 468 (10th Cir. 1958).

The Act of March 8, 1922, 42 Stat. 414, codified as 43 U.S.C. § 912, further evidences Congressional intent that the servient estate not be burdened unnecessarily with long, narrow strips of land. That act granted the reversionary interest of the United States in the inalienable right of way *to the owners of the servient estate.* In so legislating in 1922, Congress obviously had in mind the common law rule which endures today:

> "It is the general common law rule . . . that the servient estate in a strip of land set apart for railroad right of way, highway, or other comparable public purpose, passes with a conveyance of the fee to the abutting . . . tract out of which the right of way was carved . . ."
>
> *Chickasha Cotton etc. Co. v. Town of Maysville, Oklahoma*, supra, at 544.

26. The use upheld was the construction of a pipeline.

Forfeiture conditions to the Section 3 grant were obviously extinguished at the time of conveyance to bona fide purchasers for value. This is true of all conditions relating to action or inaction of the railroad, such as payment of bonds, maintenance of the road, and carriage of mail. Thus Section 5 of the Act calls for forfeiture, in the event the bonds are not redeemed, of only those lands remaining in the hands of the railroad. Again, this result is required by the purposes of the Act. If title in the hands of grantees were subject to forfeiture by reason of events over which they had no control, the grant would not suffice to raise money for the railroad or promote the settlement of the public lands.

It must be noted that only a bona fide purchase for value would defeat these conditions. That question was decided by this Court a century ago in *Platt v. Union Pacific Ry. Co.*, supra:

> "We do not say that any mortgage, however small, or manifestly made to evade a bona fide execution of the purposes for which the grants were made, or made to defeat the policy of the government which encourages the sale of public lands to private settlers and guards against the accumulation of large bodies in single hands, would be a disposal as understood by Congress. *It may be conceded it would not be, for it would be in conflict with the avowed object of the grant.*" (emphasis added)
> 99 U.S. at 64

Hence bona fide purchasers for value received a fee simple interest, subject only to the Section 2 right of way where it crossed the lands in question, and whatever right the Act may have given or reserved "by necessary or fair implication." See *United States v. Denver & R.G. Ry.*, 150

US 1 (1893)), finding such a standard of construction applicable to federal railroad grants.

It is the question of necessary or fair implication, in light of the foregoing analysis of the statutes, which is the issue in the case at bench.

D. The Congressional Intent in Enacting the Homestead Act and the Union Pacific Act Was to Promote Rather Than Impede Settlement and Cultivation by Private Ownership of Both Odd and Even Numbered Sections So Necessary Easements for Access Thereto Must Be Implied.

When Congress passed the Union Pacific Act in July, 1862, it did so in furtherance of the steps which it had recently taken to open the public domain to settlement. The Homestead Act passed on May 20, 1862, opened all of the public domain to settlement and preemption. This is why Section 3 of the Union Pacific Act granted only those odd numbered sections "to which a preemption or homestead claim may not have attached." This is why the Section 2 right of way, to which the checkerboard grants under both statutes were servient, is itself subject to crossing when necessary. *Northern Pacific R. Co. v. Townsend,* supra. This is also the reason why Section 3 lands which remained unsold three years after completion were to become subject to preemption "like other lands." Under both acts, Congress intended that the land be used by the public for settlement. Under both acts, the servient estate under the Section 2 right of way passed to private hands. In the words of the Court of Appeals:

> "It was Congress' intent that lands granted, *and most certainly lands retained,* would eventually be conveyed to private persons who would develop the land and incidentally patronize the railroad." (emphasis added)
>
> 510 F.2d at 885

With this background, what did Congress intend with respect to access to the checkerboard? Obviously, it could not have intended that the interlocking sections not be accessible for development. For centuries the common law had opposed restraints on the development of land. The intent of Congress was consistent with the remarks of Chief Justice Glynn in *Packer v. Welsted,* 2 Sid. 39, 82 Eng.Rep. 1244 (1657), who remarked that it would be to the "prejudice of the common weal, that land should lie fresh and unoccupied."

To avoid such impediments to land development, it has long been the law that a conveyance which on its face would create or reserve an otherwise landlocked parcel is deemed to impliedly convey or reserve an easement of necessity for access to the landlocked parcel. *Hancock v. Henderson,* 202 A.2d 599 (Md. 1964).

The courts have dealt with the situation where the need for access becomes apparent subsequent to the conveyance and have held that this does not defeat the easement of necessity; rather, the easement is created at the time of the conveyance and "deferred" until use of the land commences *Hancock v. Henderson,* supra. The operative fact is that at the time of conveyance, the parcel for which the easement is claimed could not be used without the easement. *Ibid.* Moreover, an easement of necessity is created even though the claimant may have a permissive revocable license for access. *Meredith v. Frank,* 47 N.E. 65 (Ohio 1897). Non-use cannot defeat an easement of necessity. *Hancock v. Henderson,* supra. Because of the underlying policy which leads to creation of easements of necessity, it is uniformly held that such easements must be located so as to impose the minimum burden on the servient estate, and that they terminate with the end of the necessity. See, e.g., *Correy v. Rae,* 58 Cal. 159 (1881).

Therefore, neither the fact that the public domain was open land in 1862 nor the fact that the access problem was not at once apparent nor government policy regarding rights of way across government land are obstacles to application of these rules to the legislation of 1862 here involved. On the contrary, Congress must be deemed to have been aware of these longstanding legal principles.

Indeed, in the instances where this exact problem has previously arisen, courts have found that the grants were intended to reserve easements of necessity by implication to reflect the intent of Congress.

Mackay v. Uinta Development Co., 219 Fed. 116 (8th Cir. 1914), relied upon by the Court of Appeals, is precisely in point and should be followed (neither petitioners nor the railroad amici discuss the case except to state that it "has no relevance," Brief of Amici Union Pacific, et al. In Support of Petition, page 19, note 17, or is "without relevance," Brief of Amici Union Pacific, et al., page 20, note 41).

Mackay involved conflict between owners of lands granted by Section 3 of the Union Pacific Act and sheep ranchers seeking access to the interlocking even numbered sections, which were still owned by the Government. The Court concluded that the ranchers were entitled to access:

> "The odd numbered Sections touch at their corners and their points of contact . . . are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, insurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights of the parties. It does not leave them to the determination of either party. As long as the present policy of the government continues, all persons as its licensees have an

> equal right of use of the public domain which cannot be denied by interlocking lands in private ownership."
> 116 Fed. at 118

Herrin v. Sieben, 127 Pac. 323 (Mont. 1912), overruled in part, *Simonson v. McDonald*, 311 P.2d 982 (Mont. 1957),[27] is also in point and has not been cited by the parties or other amici. The facts were virtually the same as the facts in *Mackay*, except that the odd numbered sections involved were granted to the Northern Pacific by the Act of July 2, 1864, 13 Stat. 356. The grant was identical to the Union Pacific Act. The Supreme Court of Montana noted in *Herrin* that the case was *not* one to be decided under common law principles regarding range animals such as were discussed in *Buford v. Houtz*, 133 U.S. 320 (1890). The stock involved in *Herrin* were *controlled* by a herder and hence the court held that the defendants could not allow them to graze on private lands, but that the lower court erred in not allowing access over the privately held odd numbered sections to the even numbered sections, which, as in *Mackay*, remained in the public domain.

The court in *Herrin* upheld the right of access in these terms:

> "The grant by the federal government to the railway company, so far as the question at issue is concerned, does not differ from a grant by one private person to another. It is impossible to gain access to the even numbered sections belonging to the government except by going over some portion of the odd sections. It must follow that there is an implied reservation by the federal government of a way of necessity, not only in favor of the government itself for access to these sections for any use to which it may wish to devote

27. See note 28 infra.

them, *but also in favor of the private citizens who wish to go upon them for the purpose of making settlements thereon,* or to cut timber when they may lawfully do so, or to explore them for mineral deposits, or, finally, to use them for grazing purposes. *The contrary view would vest in the railway company a monopoly of all the public lands within the limits of the grant* . . . . If the surface is such as to permit it, a way of reasonable width from one government section to another should be fixed in each case at the point where the corners join. If because of the broken character of the surface this should be ascertained not to be practicable in any case, then another way should be selected of such width as may be necessary." (emphasis added)

127 Pac. at 328-329[28]

Thus it is apparent that this is not a case of first impression which requires a conclusion that the Union Pacific Railroad received "unqualified and absolute title" to Section 3 lands granted by the Union Pacific Act. As we have seen, it did not receive such title to either the grant lands or the Section 2 right of way.

Nor is this a case where the Court of Appeals reached a novel and unsupportable conclusion. To the contrary, the decision of the Court of Appeals is entirely consistent

28. In *Simonson v. McDonald*, 311 P.2d 982 (Mont. 1957), the Montana Supreme Court held that reserved easements of necessity had been abolished in Montana where eminent domain rights were available to acquire the use sought, in that case a logging road. *Herrin v. Siebert* was overruled only insofar as it recognized the implied easement doctrine in cases where the eminent domain statute applied. One judge dissented from the overruling of the "carefully considered" *Herrin* decision. The Montana statute did not apply to the *Herrin* case. In any event, *Simonson* casts no doubt upon the rules known to Congress in 1864; *Herrin* is still authority for construing the statute.

with and follows the two cases which first considered this precise question more than sixty years ago.[29]

Amicus submits that this case should be resolved on the basis of these precedents. Such an interpretation of Congressional intent avoids the dilemma which otherwise results when even numbered sections are in private hands.[30] Such a ruling would resolve this case and also necessarily give the successors of the railroad a reciprocal right of access across privately owned even numbered sections, and would benefit private owners of even numbered sections who cannot resort to condemnation as can the government. Thus the purpose of both the Homestead Act and the Union Pacific Act would be served.

CONCLUSION

Title to the lands in the forty-mile wide corridor through which the Union Pacific Railroad was built were acquired from the United States under two statutes. The Homestead Act of 1862 provided that one could settle upon the even numbered sections of public lands and obtain a patent thereto. This patent was subject to the rights of others for ditches, water rights, and the mining of pre-existing mineral claims. Odd numbered sections were granted to the Union Pacific under Section 3 of the Union Pacific Act and were patented under Section 4 of said Act. Grants of both

29. In *United States v. Rindge*, 208 Fed. 611 (S.D.Cal. 1913), the Court refused to find a way of necessity across land grant lands where alternative ways of access to public lands existed.

30. It may be noted that Congress later expressly addressed the problem in the Act of July 26, 1866, 14 Stat. 253, which granted "the right of way for the construction of highways over the public lands." Conversely, it is of course true that the United States had the power to condemn rights of way across private lands for public purposes. However, when all ownership on the checkerboard is private, neither condemnation nor federal access policy is relevant.

odd and even numbered sections were subject to the railroad right of way easement where the Union Pacific railroad was constructed across them.

The courts have recognized that Congress, in enacting the Homestead Act and the Union Pacific Act, intended to encourage the settlement and cultivation of the public lands and to serve those lands with a transcontinental rail system. An Unlawful Inclosure Act[31] was passed to prevent frustration of this policy. Any argument that the transportation corridors created by the Union Pacific Act were intended then and now to serve as Maginot Lines dividing the country and impeding commerce and transportation in accordance with private policies must be rejected. The same concept advanced in the case at bench by the railroad amici under the legal appellation of "unqualified and absolute title" does equal violence to the intent of the Congress which sat in 1862.

The extent of the rights in the land granted and reserved under the Homestead Act and under Sections 2, 3 and 4 of the Union Pacific Act have been litigated for more than one hundred years. Such litigation has developed a body of law defining the correlative rights of the estates created by Congress. From the very beginning, the courts recognized and followed the Congressional intent of fostering settlement and the free flow of commerce. The only courts which have previously considered the exact question now before the Court have resolved it precisely as did the Court of Appeals for the Tenth Circuit.

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31. See note 1, supra.

Therefore, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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December, 1978

(Appendix follows)

May 20, 1862 Chap LXXV.—*An Act to secure Homesteads to actual Settlers on the Public Domain.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said person may have filed a preemption claim, or which may, at the time the application is made, be subject to preëmption at one dollar and twenty-five cents, or less, per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same shall have been surveyed: *Provided,* That any person owning and residing on land may, under the provisions of this act, enter other land lying contiguous to his or her said land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

SEC. 2. *And be it further enacted,* That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the said register or receiver that he or she is the head of a family, or is

twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: *Provided, however,* That no certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death; shall prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in other cases provided for by law: *And provided further,* That in case of the death of both father and mother, leaving an infant child, or children, under twenty-one years of age, the right and fee shall enure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any

time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicil, sell said land for the benefit of said infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified..

SEC. 3. *And be it further enacted,* That the register of the land office shall note all such applications on the tract books and plats of his office, and keep a register of all such entries, and make return thereof to the General Land Office, together with the proof upon which they have been founded.

SEC. 4. *And be it further enacted,* That no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

SEC. 5. *And be it further enacted,* That if, at any time after the filing of the affidavit, as required in the second section of this act, and before the expiration of the five years aforesaid, it shalll be proven, after due notice to the settler, to the satisfactiion of the register of the land office, that the person having filed such affidavit shall have actually changed his or her residence, or abandoned the said land for more than six months at any time, then and in that event the land so entered shall revert to the government.

SEC. 6. *And be it further enacted,* That no individual shall be permitted to acquire title to more than one quarter section under the proviisions of this act; and that the Commissioner of the Generral Land Office is hereby required to prepare and issue such rules and regulations, consistent

with this act, as shall be necessary and proper to carry its provisions into effect; and that the registers and receivers of the several land offices shall be entitled to receive the same compensation for any lands entered under the provisions of this act that they are now entitled to receive when the same quantity of land is entered with money, one half to be paid by the person making the application at the time of so doing, and the other half on the issue of the certificate by the person to whom it may be issued; but this shall not be construed to enlarge the maximum of compensation now prescribed by law for any register or receiver: *Provided,* That nothing contained in this act shall be so construed as to impair or interfere in any manner whatever with existing preëmption rights: *And provided, further,* That all persons who may have filed their applications for a preëmption right prior to the passage of this act, shall be entitled to all privileges of this act: *Provided, further,* That no person who has served, or may hereafter serve, for a period of not less than fourteen days in the army or navy of the United States, either regular or volunteer, under the laws thereof, during the existence of an actual war, domestic or foreign, shall be deprived of the benefits of this act on account of not having attained the age of twenty-one years.

SEC. 7. *And be it further enacted,* That the fifth section of the act entitled "An act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved the third of March, in the year eighten hundred and fifty-seven, shall extend to all oaths, affirmations, and affidavits, required or authorized by this act.

SEC. 8. *And be it further enacted,* That nothing in this act shall be so construed as to prevent any person who has availed him or herself of the benefits of the first section of this act, from paying the minimum price, or the price to

which the same may have graduated, for the quantity of land so entered at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases provided by law, on making proof of settlement and cultivation as provided by existing laws granting preëmption rights.

APPROVED, May 20, 1862.